

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 618 OF 2007

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The Oriental Insurance Company Ltd.
 Thane Branch, Gokhale Road,
 Above SBI, Naupada, Thane

... Appellant
 (Orig. Insurer)

Versus

1. Tajkhan Mumtaz Khan Pathan

Age about 33 years,
 Occ. : Rickshaw Driver,
 Residing at Desai Chawl,
 Jai Shastri Nagar, Shankar
 Tekadi, Mulund Colony,
 Mulund (West), Mumbai 400 082.

...Respondent No.1
 (Orig. Applicant)

2. Smt. Sukesani V. Thorat,

Age about 50 years,
 Occ.: Business, residing at 117/1,
 Veer Sambhaji Nagar,
 L.B.S. Marg, Mulund (W),
 Mumbai 400 080

..Respondent No.2
 (Orig. Opp. Party)

ALONG WITH
INTERIM APPLICATION NO. 2358 OF 2021
IN
FIRST APPEAL NO. 618 OF 2007

1. Tajkhan Mumtaz Khan Pathan

Age about 33 years,
 Occ. : Rickshaw Driver,
 Residing at Desai Chawl,
 Jai Shastri Nagar, Shankar
 Tekadi, Mulund Colony,
 Mulund (West), Mumbai 400 082.

...Applicant
 (Orig. Respondent
 No.1)

IN THE MATTER BETWEEN :

The Oriental Insurance Company Ltd.
 Thane Branch, Gokhale Road,
 Above SBI, Naupada, Thane

...Appellant
 (Orig. Insurer)

Versus

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Age about 50 years,
Occ.: Business, residing at 117/1,
Veer Sambhaji Nagar,
L.B.S. Marg, Mulund (W),
Mumbai 400 080

..Respondents
(Orig.Respondents)

Mr.R.D. Suryawanshi, Advocate for appellant.
Mr.Amol Gatane i/b Ms. Swati U. Mehta for respondents and
for applicants in IA/2358/2021

CORAM : N.J. JAMADAR, J.
Reserved for Order on : 8th DECEMBER 2021.
Pronounced on : 6th JANUARY 2022.
(THOUGH VIDEO CONFERENCE)

JUDGMENT :

1. This appeal under section 30 of the Employees Compensation Act, 1923 ('the Act, 1923') is directed against a judgment and award dated 23rd September 2005 passed by learned Commissioner for Workmen's Compensation and Judge, Fifth Labour Court, Mumbai, awarding compensation of Rs.2,58,336/- alongwith interest @ 12% per annum from the date of accident.

2. The background facts leading to this appeal can be summarized as under :-

(a) The respondent No.1/original applicant was working as a 'driver' on the auto-rickshaw bearing registration No.MH-03 J 5138 belonging to respondent No.2-original opposite party No.1 and insured with the appellant/insurer. (The parties hereinafter are referred to in the capacity, they were arrayed before the learned Commissioner).

(b) On 23rd October 1999, the applicant met with an accident at Mulund (West) and sustained multiple injuries including fracture medial malleolus, Left Tibia C with punctured wound. The applicant suffered permanent partial disability, which was assessed as 33%. However, on account of the injuries sustained in the accident, the applicant claimed to have suffered 100% functional disability as he was incapacitated to work as a driver.

(c) The opponent No.1/employer refused to accept the summons. Though, the opponent No.2/insurer was duly served with the summons, opponent No.2-insurer did not appear and hence the application proceeded ex-parte against both the opponents.

(d) The learned Commissioner recorded evidence of the applicant Taj Khan Pathan (AW-1) and Dr.Amit R. Ajkaonkar (AW-2), Orthopedic Surgeon. After appraisal of the evidence and the material on record, the learned Commissioner was persuaded to record a finding that the applicant suffered permanent disability on account of the injury sustained by the applicant during the course of the employment and thus proceed to determine the compensation in accordance with the provisions contained in section 4 of the Act, 1923. Thus, by judgment and award dated 23rd September 2005, the opponents were jointly and severally directed to pay Rs.2,58,336/- alongwith interest @ 12% per annum from the date of the accident till realization. In addition, the opponent No.1 employer was saddled with penalty.

3. Being aggrieved by and dissatisfied with the impugned judgment and award, the opponent No.2/insurer is in appeal.

4. By an order dated 28th February 2007, this Court admitted the appeal by formulating the question as to whether the learned Commissioner could have assessed the loss of earning capacity to the extent of 100% ?

5. I have heard Mr. Suryawanshi, the learned counsel for the appellant and Mr. Gatane, the learned counsel for the respondent No.1-applicant, at some length. With the assistance of the learned counsels for the parties, I have perused the material on record including the depositions of witnesses before the learned Commissioner.

6. The learned counsel for the appellant assailed the impugned judgment and award on the count that the finding of the learned Commissioner that the applicant suffered 100% functional disability is wholly unsustainable. In the face of the material on record to the effect that the partial permanent disability was assessed at 33% only, the learned Commissioner, according to Mr. Suryawanshi, committed a manifest error in recording a finding that there was 100% loss of functional disability.

7. Inviting the attention of the Court to the evidence of Dr. Amit Ajkaonkar (AW-2), Mr. Suryawanshi made an earnest endeavour to draw home the point that even if the testimony of Dr. Amit Ajkaonkar is taken at par, the learned Commissioner could not have recorded a finding that there was 100% functional disability. A further endeavour was made by Mr. Suryawanshi to canvass a submission that in any event the

opponent No.2-insurer could not have been saddled with the liability to pay interest on the amount of compensation so awarded, as the insurer was not enjoined to discharge the liability towards interest.

8. Per contra, Mr. Gatane, the learned counsel for respondent No.1 would urge that the appellant having not contested the application before the learned Commissioner, cannot be permitted to now agitate the questions of facts. It was urged with a degree of vehemence that this Court in exercise of limited appellate jurisdiction cannot entertain the aforesaid grounds of challenge since no substantial question of law arises for consideration. In the case at hand, according to Mr. Gatane, the question as to whether the applicant suffered 100% functional disability is essentially a question of fact. Therefore, the appeal deserves to be dismissed at the threshold. On merits, Mr. Gatane would urge that there is overwhelming evidence to demonstrate that the applicant suffered 100% loss of income. The applicant could not perform the avocation which he was pursuing before the accident. Thus, no fault can be found with the impugned judgment and award, submitted Mr. Gatane.

9. On the aspect of the limited nature of the appellate jurisdiction, circumscribed by the provisions contained in

section 30 of the Act, 1923, Mr.Gatane placed reliance on the judgment of the Supreme Court in the case of ***North East Karnataka Road Transport Corporation Vs. Sujatha***¹.

Paragraph Nos. 9 to 12 of the said judgment read as under :

9. At the outset, we may take note of the fact, being a settled principle, that the question as to whether the employee met with an accident, whether the accident occurred during the course of employment, whether it arose out of an employment, how and in what manner the accident occurred, who was negligent in causing the accident, whether there existed any relationship of employee and employer, what was the age and monthly salary of the employee, how many are the dependents of the deceased employee, the extent of disability caused to the employee due to injuries suffered in an accident, whether there was any insurance coverage obtained by the employer to cover the incident etc. are some of the material issues which arise for the just decision of the Commissioner in a claim petition when an employee suffers any bodily injury or dies during the course of his employment and he/his LRs sue/s his employer to claim compensation under the Act.

10. The afore-mentioned questions are essentially the questions of fact and, therefore, they are required to be proved with the aid of evidence. Once they are proved either way, the findings recorded thereon are regarded as the findings of fact.

11. The appeal provided under Section 30 of the Act to the High Court against the order of the Commissioner lie only against the specific orders set out in clause (a) to (e) of Section 30 of the Act with a further rider contained in first proviso to the Section that the appeal must involve substantial question of law.

12. In other words, the appeal provided under Section 30 of the Act to the High Court against the order of the Commissioner is not like a Regular First Appeal akin to Section 96 of the Code of Civil Procedure, 1908 which can be

1 (2019) 11 SCC 514

heard both on facts and law. The appellate jurisdiction of the High Court to decide the appeal is confined only to examine the substantial questions of law arising in the case.

10. From the perusal of the provisions contained in section 30 of the Act, 1923, it becomes evident that the appeal provided under the said section is not a comprehensive appeal in the sense that all questions of facts and law can be agitated therein. The proviso to sub-section (1) of section 30 contains an interdict that an appeal cannot be entertained unless a substantial question of law is involved in the appeal.

11. In the case at hand, since the appeal was admitted on the question as to whether the learned Commissioner could have assessed the loss of earning capacity to the extent of 100%, I deem it appropriate to proceed on the premise that the said question, as framed, in the facts of the case, assumes the character of a substantial question of law.

12. To begin with, it is imperative to note that, despite no contest on behalf of the opponents, the learned Commissioner proceeded to record the evidence of not only the applicant but Dr.Amt Ajkaonkar, the Orthopedic Surgeon, who had examined the applicant and certified the nature of injuries and assessed the disability.

13. Dr.Ajkaonkar (AW-1), informed the learned Commissioner that upon examination of the applicant, he found that the applicant was suffering from eight physical disabilities. He claimed to have issued disability certificate recording those disabilities. The certificate proved in evidence of Dr.Amit Ajkaonkar (AW-1) enumerates the disabilities as under :

- (1) Severe pain, swelling and tenderness over (L) leg, ankle and foot.
- (2) Total inability to bear full weight over (L) leg and to walk unsupported.
- (3) Difficulty and pain on walking, climbing stairs, squatting and sitting cross legged.
- (4) Restriction of movements of (L) ankle and (L) subtler joints.
- (5) Severe wasting and weakness of (L) leg and foot.
- (6) Deformity C melanin of (L) ankle.
- (7) He will require further treatment and removal of implants.
- (8) Reduced power in (L) LL.
- (9) Can not do driving due to above disabilities.

14. Dr.Amit Ajkaonkar (AW-1) further affirmed that if the patient was driver by profession, in future he would not be able to drive the vehicle. To add to this, the applicant also affirmed that a steel implant was inserted in his left leg. He could not drive the vehicle because of the said injury. He was unable to bear full weight on the left leg and could not walk without support. He could not run as well as squat and sit cross legged. The movement of his left leg has been restricted at subtler joints and there is a severe wasting and weakness of left leg and foot.

The applicant further affirmed that he cannot do any type of work and therefore there is 100% loss of earning capacity.

15. As indicated above, the aforesaid evidence has gone unchallenged. Even otherwise, it seems that the evidence of Dr.Amit Ajkaonkar (AW-1) gives a vivid account of the nature of the disability suffered by the applicant. The fact that Dr.Amit Ajkaonkar had assessed partial permanent disability at 33% is not decisive. What is significant is the effect and impact of permanent disability on the earning capacity of the claimant.

16. A profitable reference, in this context, can be made to the judgment of the Supreme Court in the case of ***Raj Kumar Vs. Ajay Kumar & Anr.***², wherein the method of determination of loss of earning capacity in case of personal injury, was delineated. Relevant parts of paragraphs 13 and 14 of the said judgment are instructive and, thus, extracted below:

“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 disability (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

2 (2011) 1 SCC 343

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.....”

17. Applying the aforesaid principles to the facts of the case, in my considered view, the learned Commissioner was wholly justified in recording a finding that the loss of earning capacity was 100% inasmuch as the applicant had sustained such a disability that it incapacitated the applicant to drive the vehicle, as he used to do prior to the accident. The applicant was rendered incapable to perform the avocation which he was pursuing before the accident. In such circumstances, the fact that the physical disability was assessed at a lower threshold is of no significance for the reason that the impact of the disability was total deprivation of the capacity to earn as a driver. Thus, I am not persuaded to accede to the submission on behalf of the appellant that the learned Commissioner committed an error in assessing the loss of income at 100%.

18. The second challenge sought to be raised on behalf of the

appellant regarding the liability to pay interest on the amount of compensation awarded by the learned Commissioner, from the date of the accident is required to be stated to be repelled. A conjoint reading of the provisions contained in section 3 and section 4A of the Act, 1923 makes it abundantly clear that the insurance company is enjoined to satisfy the claim for compensation alongwith interest as imposed on the insured-employer by the Commissioner for Employees' Compensation.

19. It must be noted that Mr.Suryawanshi, the learned counsel for the appellant, did not pursue this challenge vigorously and fairly submitted that the judgment of the Supreme Court in the case of *Ved Prakash Garg Vs. Premi Devi & Ors.*³ settles the issue against the insurer. However, Mr. Suryawanshi sought to place reliance on the judgment of the Supreme Court in the case of *P.J. Narayan Vs. Union of India & Ors.*⁴ to bolster up the submission that in the absence of contract, the insurance company cannot be saddled with the liability to pay interest.

20. I am afraid, the judgment in the case of *P.J. Narayan* (Supra) is of any assistance to the appellant. In the said case,

3 AIR 1997 SCC 3854

4 2004 ACJ 452

the writ petitioner sought a direction against the insurance company to delete the clause in the Insurance Policy which provided that in case of compensation under the Workmen's Compensation Act, 1923, the Insurance Company will not be liable to pay interest. In the backdrop of such a prayer, the Supreme Court observed that there was no substance in the petition as insurance, being a matter of contract between the Insurance Company and the insured, it was open to the Insurance Company to refuse to insure and provide by contract that they will not take on liability for interest.

21. The conspectus of the aforesaid consideration is that the appeal is devoid of substance.

22. Hence, the following order :

O R D E R

- (i) The appeal stands dismissed with costs.
- (ii) In view of dismissal of the appeal, Interim Application does not survive and accordingly stands disposed of.

[N. J. JAMADAR, J.]