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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.441 OF 2009

Mohammad Miraj Kurshid Alam Shaikh ... Appellant

V/s.

Umia Enterprises ... Respondent

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Ms. Rina Kundu for the appellant.

Mr. D.S. Joshi for the respondent.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 23, 2023

P.C.:

1. The first appeal arises out of Judgment and Order dated 6th June 2008 passed by the learned I/C Commissioner for Workmen's Compensation & Judge, First Labour Court, Thane partly allowing the application directing employer and insurance company to pay an amount of Rs.3,18,773/- towards compensation along with interest at the rate of 9% per annum from the date of accident till its realization and penalty at the rate of 50%.

2. According to the appellant, he worked as the RCC fitter at a monthly salary of Rs.4,575/-. However, on 7th June 2006, while he was in employment by respondent no.1, he met with an accident resulting in an amputation of the leg above the knee. The appellant, therefore, filed an application seeking compensation of Rs.5,31,288/- before the Commissioner of Workmen's

Compensation.

3. The employer admitted the employment and salary of the appellant; however, he denied his liability for compensation as the site was insured with respondent no.2. respondent no.2 denied primary liability as, according to him, the primary liability is of the employer to deposit the amount of compensation in Court.

4. After allowing parties to lead evidence, the Commissioner framed necessary issues and partly allowed application by impugned Judgment and Order.

5. Aggrieved thereby, the appellant has filed the present first appeal for enhancement of compensation seeking 100% occupational liability. The rate of interest of 9% also sought to be modified.

6. Learned advocate for the appellant submitted that the appellant has proved that he was working as the RCC fitter. Therefore, the result of disability is 100% occupation disability. Therefore, it would amount to total disablement as defined in Section 2(I) of the Workmen's Compensation Act.

7. *Per contra*, the learned advocate for the insurance company submitted that the Commissioner, based on the doctor's certificate, has rightly adjudicated the disablement of the appellant at 60%. Even according to schedule clause 19, the percentage of disability would be 60%. He, therefore, submits that no interference is required. He submitted that apart from the work of the RCC fitter, he could do any other work and, therefore, it cannot be termed total disablement as defined under section 2(I) of the Workmen's

Compensation Act, 1923.

8. Rival contentions fall for consideration.

9. Based on the statement on oath and defence raised by the employer, the appellant has proved that he was working as the RCC fitter. The Commissioner has accepted the said fact and has recorded a finding to that effect. There is no challenge to the said finding by the employer or the insurance company.

10. In so far as the fact as to whether the disability of the appellant would be covered by the expression "total disablement" under section 2(1)(I) of the Act, it is necessary to read the relevant provision. Section 2(1)(I) of the Act reads thus:

“2. Definitions.— (1) In this Act unless there is anything repugnant in the subject or context-

(I) “total disablement” means such disablement, whether of a temporary or permanent nature, as incapacitates an employee for all work which he was capable of performing at the time of the accident result in such disablement.

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more;”

11. Total disablement is of two types:

(I) *Temporary total disablement*— In temporary total disablement, the earning capacity of a workman is lost for a temporary period for all work he was capable of performing at the time of the accident.

(ii) *Permanent total disablement*— Total permanent disability is a condition in which an individual can no longer

work due to injuries. Total permanent disability, also called permanent total disability, applies to cases where the individual can never work again.

12. The certificate dated 13th March 2007 issued by Dr. Sujit R. Jain indicates that the appellant was injured on 7th June 2006 and was admitted to his hospital till 25th June 2006. Dr. Jain certifies that the appellant suffered injury above the knee, resulting in a leg amputation. The certificate contains injury "above knee amputation leg". The certificate mentions that the Appellant is unable to perform daily routine activities. The claimant has proved the certificate by his oral evidence. In the cross-examination of the claimant, except the suggestion that he is stating falsely that he is 100% disabled, nothing else has been brought on record.

13. There can not be a dispute that the appellant suffered from disablement of permanent nature. The disablement has incapacitated him from doing the work he could do. The said work was that of the RCC Fitter. Therefore, the Commissioner for Workmen's Compensation was wrong in holding that the disability of the appellant will have to be treated as 60% disability. The Reinforcement Fitter is responsible for fabricating and fixing reinforcement for complex structures such as arches, domes, and circular structures in a sequential manner to meet works requirements within specified time and tolerance. The appellant has been rendered incapable of doing such work due to her disability. As is evident from the certificate of Dr. Jain, by loss of one leg above the knee, he has been evidently rendered unfit to perform the work of RCC fitter as such work cannot be done by

one leg only. Hence, the case of the appellant will be covered by the definition of “total disablement”, therefore, being 100% disabled.

14. In a recent judgment in the case of ***Chandramma v. NCC Ltd.*, (2023) 2 SCC 144**, the Apex court has observed as under:

“25. Thus, it is an admitted position that the appellant can no longer pursue the work of a labourer. This Court in *Raj Kumar v. Ajay Kumar* [*Raj Kumar v. Ajay Kumar*, (2011) 1 SCC 343 : (2011) 1 SCC (Civ) 164 : (2011) 1 SCC (Cri) 1161] held that : (SCC pp. 350-51, held that:

“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 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 per cent, 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 be 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.

15. 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.”

26. Similarly, in *K. Janardhan v. United India Insurance Co. Ltd.* [*K. Janardhan v. United India Insurance Co. Ltd.*, (2008) 8 SCC 518 : (2008) 2 SCC (L&S) 733, this Court held that:

“The loss of earning capacity in the case of 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 % and awarded compensation on that basis. The High Court, however,

referred to Schedule 1 to the Workmen's Compensation Act, 1923, and held that loss of a leg on amputation resulted in only 60% loss of earning capacity. This Court set aside 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%."

27. This Court in *S. Suresh v. Oriental Insurance Co. Ltd.* (2010) 13 SCC 777 : (2011) 1 SCC (Civ) 807 : (2011) 2 SCC (Cri) 423], held that : (SCC p. 780, para 9)

"9. We are of the opinion that on account of amputation of his right leg below the knee, he is rendered unfit for the work of a driver, which he was performing at the time of the accident resulting in the said disablement. Therefore, he has lost 100% of his earning capacity as a lorry driver, more so, when he is disqualified from even getting a driving licence under the Motor Vehicles Act, 1988."

(emphasis supplied)

28. Having considered the aforesaid facts of the present case and the dictum of the judicial pronouncements referred to above and the position of the appellant after the accident, incapacitated her from carrying out her vocation as a labourer, we are of the opinion that the impugned order [*Chandramma v. NCC Ltd.*, 2018 SCC OnLine Kar 4203] passed by the High Court is not liable to be sustained. The functional disability of the appellant is liable to be assessed as 100% and, accordingly, the compensation is to be determined.

....."

15. In so far as the statement made on behalf of the insurance company that such worker can perform any other work is concerned, the doctor in his certificate has stated that the appellant cannot perform daily activities. Coupled with the said certificate, considering the nature of the job performed by the

appellant, in my opinion, the occupational disability of the appellant would be covered by the expression "total disablement" as defined in Section 2(1)(I) of the Act as the amputation of the leg above knee incapacitates the appellant for all work which he was performing at the time of accident result in such disablement. Moreover, the appellant was performing the work of the RCC fitter. Therefore, the expression 'work' that he was capable of doing at the time of the accident needs to be interpreted with the work of the RCC fitter. Therefore, in my opinion, the Commissioner was not justified in restricting occupational disability to 60%. I, therefore, hold that the appellant is covered by the expression 'total disablement'.

16. Regarding the quantum of interest, provisions of section 4A(3)(a) mandate payment of simple interest at the rate of 12% per annum or such rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified. In the facts of the case, the Commissioner had granted interest at the rate of 9% per annum, which needs to be modified to 12% per annum.

17. For the aforesaid reasons, the first appeal is allowed. The Judgment and Award passed by the Commissioner stand modified in the following terms:

- (a)** Respondent nos.1 and 2 shall pay an amount of Rs.5,31,288/- to the appellant towards compensation;
- (b)** Respondent no.1 (employer) shall pay interest at the rate of 12% per annum on the amount of compensation from the date of the accident till its realization, along with a

penalty at the rate of 50% on the amount of compensation.

(c) The amount already paid shall be deducted from the aforesaid amounts.

18. The first appeal is disposed of in the above terms. No costs.

(AMIT BORKAR, J.)