



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

FIRST APPEAL NO. 447 OF 2010

APPELLANTS : 1. Executive Engineer, Maharashtra State
Electricity Urban Distribution
Company Limited (O & M),
Ramnagar, Gondia, Tahsil and Distt.
Gondia.

2. Junior Engineer, Distribution Centre,
Maharashtra State Electricity
Distribution Committee, Now,
Maharashtra State Electricity
Distribution Company Limited,
Manohar Chowk, Gondia.

//VERSUS//

RESPONDENT : Danvir Kachru Nandeshwr, Aged
about : Major, Occ. Line Helper, R/o.
Shastri Ward, Govindpur, Gondia,
Tah. & Distt. Gondia.

Mr. A.D. Mohgaonkar, Advocate for the Appellants.

Mr. A.N. Vastani, Advocate for the Respondent.

CORAM : G. A. SANAP, J.

RESERVED ON : 9th MAY, 2024.

PRONOUNCED ON : 12th SEPTEMBER, 2024.

JUDGMENT

. In this appeal, challenge is to the judgment and order

dated 30th January, 2010, passed by the learned Commissioner under the Workmen's Compensation Act and Labour Court at Gondia (hereinafter referred to as, "the Commissioner"), whereby the claim application filed by the respondent was allowed.

02] The facts are as follows:

The respondent is a permanent employee of the appellants. The accident occurred on 11th June, 2002, at Gondia. He was working as a line helper under the control of the appellants. On 11th June, 2002, the respondent was on duty between 4:00 p.m. and 12:00 p.m. at Distribution Centre under the control of appellant No.2 at Manohar Chowk, Gondia. On 11th June, 2002, a complaint of consumer Shri Kaviraj Meshram of Chhota Gondia with regard to the discontinuation of the electric supply was received. The respondent visited the spot at 10:00 p.m. along with the lineman of appellant No.1. On inspection of the electric meter, the respondent found that the supply of the electricity was disconnected from the electric pole. The respondent, with the help of a cradle after wearing the safety hand gloves for regularizing the electric supply, climbed the electric pole. He removed the fault, but while coming down from the pole, the iron hook of the cradle touched the live electric wire. The respondent suffered a severe electric shock, and he fell down on the ground. He sustained grievous fracture injury to his right leg. He became unconscious. He was immediately taken to

K.T.S. Government Hospital, Gondia, and admitted there for giving first aid. The officials of the appellants visited the hospital and the spot of the incident on receipt of the information of the accident. He was treated in various hospitals, including private hospitals, from 11th June, 2002, to 31st March, 2003. He joined his duties on 1st April, 2003.

03] It is the case of the respondent that, on account of this accident, he suffered physical disability. He has not been able to discharge his duties efficiently. He has been facing severe hardships and difficulties in his day-to-day life. He is unable to pursue his day-to-day activities of life efficiently. He had borrowed the money from his relatives for his treatment. In the application, he has stated that he has suffered 42% permanent disability. He was examined by the Board at M.C.H., Nagpur. On account of the fracture, there is a loss of his earning capacity.

04] The appellants filed the reply and opposed the claim application. It was contended that, after medical treatment, the respondent resumed his duties. He has been paid salary for his absence from duty on account of his hospitalization. There is no loss of income as such. It was further contended that while coming down from the pole after regularizing the supply to the connection of the

consumer, he did not take proper care. He was negligent. The accident occurred due to his negligence. Similarly, it was contended that while resuming the duty, he had submitted the disability certificate, wherein it was stated that he had suffered 40% temporary disability. The second certificate, relied upon by him, which mentions 42% permanent disability, was obtained by suppressing the material facts. It was further contended that there was no loss as such. He has been allotted the duty suitable to his physical fitness. Neither his salary nor future prospects have been affected.

05] The respondent examined himself and one additional witness to prove his claim. The appellants have also examined two witnesses. The learned Commissioner, on consideration of the evidence, allowed the claim application and directed the appellants to pay Rs.2,47,219.64 towards compensation. The learned Commissioner has also directed the appellants to pay interest on this amount @ 9% per annum from the date of the accident and also to pay the penalty @ 25% on the amount of compensation. Being aggrieved by this order, the appellants have filed this appeal.

06] I have heard Mr. A.D. Mohgaonkar, learned advocate for the appellants and Mr. A.N. Vastani, learned advocate for the respondent. Perused the record and proceedings.

07] Learned advocate for the appellants submitted that the order directing the appellants to pay the compensation passed by the learned Commissioner is not in accordance with the law. The learned Commissioner has failed to consider the vital evidence adduced by the parties. The respondent, after taking medical treatment, resumed his duties. There was no loss of income as such. The evidence adduced by him with regard to the disability suffered by him is not reliable. He has produced on record two certificates. The first certificate shows that 40% disability suffered by him was temporary. He was allowed to resume his duties on the basis of this certificate. The second certificate obtained from the Medical Board with 42% permanent disability is contrary to the first certificate. The respondent obtained the certificate by suppressing the material facts from the Board. Learned advocate further submitted that the learned Commissioner did not issue any show cause notice to the appellants and called upon them to show cause as to why the appellants shall not be directed to pay the penalty. Learned advocate submitted that the penalty cannot be imposed without offering an opportunity to the employer to show the cause. Learned advocate submitted that even if it is assumed that he has suffered loss of earning capacity on account of the so-called disability, since his salary and future prospects did not affect, he is not entitled to get the compensation.

08] Learned advocate for the respondent submitted that for

the purpose of the claim under the Workmen's Compensation Act, 1923 (for short, "the Act of 1923"), which is social beneficial legislation, actual loss of income is not *sine qua non*. The accident in this case is undisputed. The injuries suffered by him, i.e., fracture to his leg, are also not in dispute. The respondent, on account of this fracture injury, is not able to do his routine work and his work at the office efficiently. He has been facing difficulties. Learned advocate submitted that, on account of the fracture and permanent defect of his leg, he has not been able to do his routine work and the official work as efficiently as he was able to do prior to this accident. Learned advocate submitted that the compensation awarded by the learned Commissioner is just, proper, and reasonable. As far as the award of penalty is concerned, learned advocate submitted that the notice of the claim application was issued to the appellants. The appellants have filed the written statements and denied the claim in toto. In the submission of the learned advocate, the notice issued on the claim application was sufficient compliance and, as such, an opportunity to the appellants to show cause on this count. Learned advocate further submitted that, unless and until it is pointed out that the order passed by the learned Commissioner is perverse, the finding of fact recorded by the Commissioner cannot be interfered with in the exercise of powers under Section 30 of the Act of 1923 in the appeal. Learned advocate, in support of his submission, placed reliance on the following decisions:

1. *Golla Rajanna and Ors. Vs. Divisional Manager and Anr. [(2017) 1 SCC 45].*
2. *Odisha State Road Transportation Corporation Vs. Lokanath Hota S/o. Late Sriram Chandra Hota [2013 SCC OnLine Ori 327].*
3. *Jayaraj (V.) Vs. Thanthai Periyar Transport Corporation, Ltd. [Civil Miscellaneous Appeal No.445 of 1981, decided on 25th August, 1987].*
4. *Tamil Nadu Cements Corporation, Ltd. Ariyalur Works, Ariyalur Vs. N. Jayapalan [1993-II L.L.N. 685].*

09] Learned advocate for the appellants has placed heavy reliance on the decision in the case of *Prasanta Kumar Majhi Vs. Managing Director, Orissa Mining Corporation, Bhubaneswar and Ors. [2001 (91) FLR 274].*

10] At the outset, it would be necessary to make a brief mention of the admitted facts. There is no dispute as to the occurrence of the accident. There is no dispute about the injury sustained by the respondent in the said accident. There is no dispute about the employer and employee relationship. The injury was suffered by the respondent while discharging his duties. The respondent took treatment in the private hospital and spent huge

amount from his pocket. Even after the accident, on the basis of the fitness certificate issued by the doctor, the respondent resumed his duties. During the course of his employment, after the accident, he was given an assignment or work keeping in view the fracture sustained by him to his leg.

11] The Hon'ble Apex Court in the case of ***Golla Rajanna and Ors. Vs. Divisional Manager and Anr.*** (supra), while considering the scope of the appellate power under Section 30, has held that in the exercise of the appellate power, the interference with the findings of fact is not permissible unless the findings are perverse.

12] In the case of ***Odisha State Road Transportation Corporation Vs. Lokanath Hota S/o. Late Sriram Chandra Hota*** (supra), the learned Single Judge of the Orissa High Court has held that there is a difference between an award for loss of earnings and the loss of earning capacity. It is held that even if it is proved that there was no loss of earnings, but there was loss of earning capacity, the employee is entitled to get compensation. It is observed that, while deciding such a claim, the Court has to consider whether the employee, after the injuries sustained in the accident, is able to perform his duties efficiently as he was performing before the accident.

13] In the case of *Jayaraj (V.) Vs. Thanthai Periyar Transport Corporation, Ltd.* (supra), the Madras High Court has held that the percentage of loss of earning capacity has to be assessed on the basis of the evidence. It is observed that even if the employee continues to carry on his work after the accident, he cannot be denied the compensation. The Court has to decide the loss of earning capacity on the basis of the disability suffered by him. It is observed that the theme in the Workmen's Compensation Act is to provide security to the workman who has received the partial incapacity and loss of earning capacity. The extent of loss in the workman's earning capacity has to be calculated having regard to all the facts.

14] In the case of *Tamil Nadu Cements Corporation, Ltd. Ariyalur Works, Ariyalur Vs. N. Jayapalan* (supra), it is observed that the percentage of permanent disability as fixed by a doctor is a proper guide to assess the damages by the Court. It is always open to the employer to establish in cross-examination of the doctor that the opinion rendered by him is unacceptable. It is further held that the permanent disability suffered by a workman has to be considered. It is held that even if the workman continuously works and he was paid higher salary even after the accident, the workman cannot be denied damages on account of permanent disability.

15] It would be profitable to consider the law laid down by the Division Bench of the Orissa High Court in the case of ***Prasanta Kumar Majhi Vs. Managing Director, Orissa Mining Corporation, Bhubaneswar and Ors.*** (supra). This judgment has been relied upon by the learned advocate for the appellants. In this case, the employee was a driver. He had sustained injuries while driving the truck. Even after the accident, on resuming his duties, he continued as a driver despite injury without any loss of wages. The Division Bench of the Orissa High Court has held that if there is no loss of wages and earning capacity, then the employee is not entitled to get the compensation. The Orissa High Court has held that it is not possible to agree as a general proposition that continuation in the same employment without any loss and wages cannot mean that there is no loss of earning capacity. It depends upon the facts of each case. In short, the Division Bench of the Orissa High Court has held that even if there is no loss of earnings but there is loss on earning capacity on account of the disability suffered by the employee, then he is entitled to get compensation under the Workmen's Compensation Act.

16] In my view, while addressing the issues of fact, it is necessary to bear in mind that this Act is social welfare legislation. The object of the legislation is to protect the employee in case of tragedy befallen either on the employee or his family members. The

loss of earnings and the loss of earning capacity are two distinct and separate aspects. These are not interchangeable. Even if there is no loss of earnings, there can be a loss of earning capacity. The terminology 'loss of earning capacity' has to be given a wider interpretation. In my view, such a wider interpretation would encompass within its scope, the consequences of the disability suffered by the employee in his day-to-day life as well as affecting his general work efficiency. It cannot be always correlated with his employment in the sense that, on account of the disability suffered by him, he was neither discontinued nor lost his job. The Court has to keep in mind the overall and general consequences of the disability while addressing the issue of loss of earning capacity. The loss of earning capacity, as a result of disability suffered in the accident, has to be treated as a permanent impact on the physique of the employee. Therefore, the submission that only in case of loss of earnings, the employee is entitled to get the compensation cannot be accepted. The acceptance of such a submission, in my view, would attack at the very object of this social legislation. Such a view would be contrary to the object of the legislation. In my view, even if there is no loss of earnings, the employee is entitled to get compensation on account of the loss of earning capacity on account of the disablement.

17] I have perused the judgment and order passed by the

learned Commissioner. The learned Commissioner has taken into consideration the evidence adduced by the parties to arrive at a finding of fact. The respondent, in his evidence, has categorically stated about the accident and the loss of earning capacity on account of disability suffered by him. He has stated that, on account of this injury, he cannot climb on the pole for doing his duties. He is also not able to do any work, which puts a strain on his leg. He has admitted that he was given work suitable to him, keeping in mind his disability. He has stated that, initially, at the time of resuming his duties, he had submitted a certificate at Exh.69. In this certificate at Exh.69, it is stated that he has suffered 40% temporary disability. This certificate was obtained on 17th April, 2003. The respondent has produced on record two disability certificates, wherein the permanent disability suffered by him was stated as 42%. In order to prove these two certificates at Exhs.76 and 77, the respondent has examined the Medical Officer attached to K.T.S., Government Hospital, Gondia.

18] Witness No.2, the Medical Officer, has stated that he was one of the members of the Board, which, at the relevant time, comprised of four members. The Board had examined the respondent. On examination, Members found that he had sustained fracture talus (Rt) with arthritis ankle joint. The Board assessed the permanent disability as 42%. He has proved these certificates. The

certificates are at Exhs.76 and 77. He has stated that the certificates have been issued on account of his permanent disability for the purpose of the facility of the railway concession and the benefits of social welfare schemes. In my view, the purpose of issuance of a certificate is not an important issue before the Court. The important issue before the Court is with regard to the nature of the disability and the percentage of the disability. Despite searching cross-examination of the doctor, it has not been demonstrated that the disability was not permanent and the percentage was not 42. In my view, therefore, the evidence adduced by the respondent has been found sufficient by the learned Commissioner to accept his claim. On reappraisal of the evidence, I am satisfied that, on this count, the learned Commissioner has not committed any mistake or perversity. This finding is based on the proper appreciation of evidence. On the basis of this evidence, the respondent has proved that he has suffered 42% permanent disability. The permanent disability has affected his earning capacity. The evidence is sufficient to prove that, on account of the fracture sustained to his leg, he has suffered the loss of earning capacity.

19] It is to be noted that the injury suffered by him has not been defined as a schedule injury. It is a non-schedule injury. The disablement suffered by him would be covered by Section 4(1)(c)(ii) of the Act of 1923. In my view, the submission of the learned

advocate for the appellants that this injury would fall under Section 4(1)(b) of the Act of 1923 cannot be accepted. Section 4(1)(c)(ii) of the Act of 1923 would be applicable in this case. It provides for determination of compensation in case of an injury not specified in Schedule I that has resulted in the disablement. The assessment of the compensation has to be made on the basis of a percentage of total disablement. On this count also, the learned Commissioner has not committed any mistake. There is no dispute about the salary of the respondent at the relevant time. The learned Commissioner has taken his total salary into consideration. The learned Commissioner has applied the proper factor for arriving at the compensation commensurate with the percentage of the permanent disability suffered by him.

20] The next important important question is with regard to the direction given by the learned Commissioner to the appellants to pay the penalty of 25% on the amount of compensation. Learned advocate for the appellants pointed out that, on filing of the claim application, no specific show cause notice was issued to the appellants, and the appellants were not granted an opportunity to explain the cause for non-payment of the amount of compensation. Learned advocate submitted that, unless and until such an opportunity is granted by issuing a specific show cause notice, the

Commissioner was not right in directing the appellants to pay the penalty. Learned advocate for the respondent submitted that the separate show cause notice is not contemplated. The notice, on filing of the application, would serve the purpose. In this case, undisputedly, show cause notice was not issued to the appellants by learned Commissioner.

21] In my view, in order to address this issue, it is necessary to consider the settled legal position. The Hon'ble Apex Court in the case of *Oriental Insurance Co. Ltd. Vs. Siby George and others* [2012 III CLR 6 : (2012) 12 SCC 540] has held that interest on the amount of compensation becomes due when there is a default in payment of compensation. The reasons for default are immaterial. It is held that where there is delay without justification, the employer is also liable to pay penalty after giving him an opportunity to show cause. The same view has been taken by the coordinate bench of this Court in the case of *Udhav Rangnathrao Pawar Vs. Sheshrao Ramji Jogdand and another* [2009 III CLR 697] and Punjab and Haryana High Court in the case of *Rajni Rani and others Vs. Om Prakash and others* [1992 (65) F.L.R. (P&H) 800].

22] As a result of the above observation, I conclude that there is no substance as far as the compensation and interest awarded by the learned Commissioner is concerned. As far as the penalty is

concerned, the order needs to be set aside. Hence the following order:

ORDER

- i] The appeal is **partly allowed**.
- ii] The order dated 30th January, 2010, passed by the learned Commissioner under the Workmen's Compensation Act and Labour Court at Gondia in N.F.W.C.A. No.03/2004, directing the appellants to pay the compensation and interest, is maintained.
- iii] The order dated 30th January, 2010, directing the appellants to pay the penalty, is set aside.
- iv] The appeal stands disposed of in the aforesaid terms. No order as to costs.

(G. A. SANAP, J.)

Vijay