



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1227 OF 2024

Chandru Dhiru Butiya.

...Appellant.

Versus

1. Shyam Jagshi Bhjaiya

2. Shriram General Insurance Co., Ltd.

...Respondents.

Mr. Amol Gatne for the Appellant.

Ms. Shalini Shankar for the Respondent No. 2.

Coram : Sharmila U. Deshmukh, J.

Date : January 23, 2025.

P. C. :

1. First Appeal is filed by the original claimant challenging the judgment dated 7th December 2023 passed by the Commissioner for Employees Compensation dismissing the claim Application of Appellant.

2. Facts as can be discerned from the record are that the Applicant claimed to be employed by the Respondent No.1 as Driver of auto rickshaw and met with an accident on 7th April 2008 at Vasai Phata Bridge, Vasai and sustained serious injuries. The Application stated following injuries :

- 1] Lt. Superior Pubic Rami Fracture.
- 2] Lt. Inferior Pubic Rami Fracture.
- 3] CLW and Abrasion to Lt. Thigh 10X6 cm.

- 4] Blunt trauma to lower back.
- 5] Injury to Rt. Hip region.
- 6] And other injuries as per medical paper.

3. It was contended that he was admitted in Dr. Babasaheb Ambedkar Municipal Hospital on 7th April 2018 and discharged after 2 days, i.e., on 9th April 2018. It was further contended that the Applicant has suffered 100% loss of earning capacity due to injuries.

4. The Opponent No.1 accepted the employer-employee relationship, the income of Appellant as also the accident on 7th April 2018. It was contended by the Opponent no.1 that the liability is of the insurance company to pay compensation, if any awarded.

5. The insurance company resisted the claim Application denying the accident as well as the employer-employee relationship. It was contended that insurance policy does not cover the risk of a contracting party running the insured vehicle on shift or contract basis and thus there was no employer-employee relationship.

6. The Commissioner for Employees Compensation after considering the evidence including the documentary evidence dismissed the claim.

7. Learned Counsel appearing for the Appellant would submit that even if the disability certificate does not bifurcate the percentage of disability and the percentage of loss of earning capacity, it needs to be

noted that the injury was non scheduled injury and therefore there is no requirement of bifurcation. He would further submit that it is clear from the evidence on record and in particular the disability certificate that the Appellant has suffered some injury, therefore, compensation ought to have been granted at least for the temporary injury sustained. Pointing out to the disability certificate he submits that doctor has opined that the Appellant is unable to drive any vehicle and unable to walk, stand or squat and therefore loss of 100% earning capacity is proved as the Appellant was auto rickshaw driver.

8. *Per contra* Ms. Shalini Shankar, learned Counsel appearing for the Respondent No.2 would submit that apart from material admissions given in the cross-examination, subsequently the Appellant has renewed his driving licence which is noted in the impugned judgment and therefore it is clear that there is no loss of earning capacity.

9. I have considered the submissions and perused the record.

10. Under Section 30 of the Employees Compensation Act, 1923, appeal lies to the High Court only on a substantial question of law. The submission of the Learned Counsel for Applicant is that the evidence on record establishes the injury suffered by the Applicant and the medical certificate records the disability at 54% and considering the injuries the loss of earning capacity is 100%, which has not been considered.

11. Before considering the findings of the Trial Court, it will be apposite to refer to Section 4 of Employees Compensation Act, 1923 which provides that where the permanent partial disablement results from the injury in case of non scheduled injury, the percentage of compensation payable in 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.

12. As the application claimed 100% loss of earning capacity, the burden was upon the Applicant to prove the same. The Trial Court has considered the evidence of witnesses examined by the Applicant, the first being the Doctor from BDBA Hospital, who did not have any personal knowledge as he had not examined the patient. The Trial Court has considered that the discharge card does not bear the seal of the Hospital or signature of doctor issuing the same. The Trial Court further noted that the Applicant has stated to the police on 17th August, 2018 that on 7th April, 2018, he had received minor injuries to his back and accident occurred due to sudden application of brake of rickshaw. As no medical papers except the discharge card was produced which did not contain the seal of hospital or signature of doctor, the Trial Court rightly disregarded the evidence on the aspect of injuries sustained by the Applicant.

13. The Trial Court has further considered the evidence of the

second witness Dr. Naresh Khanna, who has deposed that there was no surgery and that he had found seven disabilities and assessed the disability at 54%. The Trial Court noted that the witness in the cross-examination has admitted that he had not treated the patient and only disability certificate was given by him. He has further admitted that he cannot bifurcate the disability. The Trial Court noted that the disability certificate does not bifurcate the percentage of earning capacity.

14. The Trial Court further noted that the Insurer had examined the clerk of RTO department who has deposed that the Applicant had renewed his driving license and at that time had produced his medical certificate.

15. The substantial questions of law as framed in the Appeal memo are that whether for the purpose of Section 4 term “loss of earning capacity” would require the evidence of re-instatement in service or mere renewal of driving license would be sufficient and whether in the light of evidence in the form of disability certificate and the deposition of doctor stating that claimant cannot drive any vehicle, the loss of earning capacity under Section 4(1)(c) of the Employees’ Compensation Act, 1923 will have to be taken at 100%.

16. For purpose of arriving at a finding of permanent partial disablement, the burden was upon the Applicant to prove the loss of earning capacity as assessed by qualified medical practitioner. In the

present case, admittedly the disability certificate does not mention loss of earning capacity as provided under Section 4 of Employees Compensation Act. Further, the Trial Court has held that the doctor issuing the disability certificate is not the treating doctor and that the discharge card does not establish the injuries. The fact that doctor has admitted in the cross-examination that he was not the treating doctor and that patient had approached him only to obtain the disability certificate takes away the very foundation of claim of any disability or loss of earning capacity. He has further admitted that the healing period of fracture is one year and that the patient had approached him only for obtaining the disability certificate. The findings on permanent partial disablement are findings of fact and based on the evidence on record. There is no perversity demonstrated from the findings of the Trial Court.

17. The fact that the Applicant was an auto rickshaw driver and had renewed the license would establish that there is no loss of earning capacity. The evidence on record is more than sufficient to establish that there was no bifurcation of disability and the loss of earning capacity, and merely because some injury was sustained in the accident, it cannot be said that there was 100% loss of earning capacity. It was for the Appellant to demonstrate that there was 100% loss of earning capacity and permanent partial disability, which has not

been proved in the present case.

18. The questions of law raised in the Appeal memo are questions of fact and the Commissioner for Employees Compensation has rendered the findings on facts as per the evidence on record. As such no substantial question of law arises in the present Appeal. First Appeal stands dismissed.

[Sharmila U. Deshmukh, J.]