

(2009) 03 KL CK 0074
In the High Court Of Kerala
Case No : M.A.C.A. No. 526 of 2003

Alagadurai

APPELLANT

Vs

P. Immanuel Nasa Justin and Others

RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Kerala Motor Vehicles Rules, 1989 — Rule 381(2)
Motor Vehicles Act, 1988 — Section 147, 147(1), 166, 4, 8
Workmens Compensation Act, 1923 — Section 2(1)(1), 2(1)(g), 4(1)

Citation : (2010) ACJ 184 : (2009) 2 ILR (Ker) 52 : (2009) 2 KLJ 17 : (2009) 2 KLT 368

Hon'ble Judges : R. Basant, J;C.T. Ravikumar, J

Bench : Division Bench

Advocate : Mathew Skaria and Joy Joseph, for the Appellant; P. Jayasankar, V. Rajendran and Sathish Ninan, for the Respondent

Judgement

R. Basant, J.

(i) Does "Act only policy" u/s 147 of the Motor Vehicles Act, 1988 (for short "the Act") cover the liability under the Workmen's Compensation Act, 1923 (for short "the W.C. Act") of the owner of a goods carriage in respect of a driver employed by him who was not engaged in driving the vehicle; but was carried in the vehicle in connection with his employment at the time of the accident?

(ii) Can injuries falling under any one of the Entries in Part II of Schedule 1 of the W.C. Act even be reckoned as total disablement u/s 2(1) and 4(1)(b) of the W.C. Act? These are the two questions of law arising for consideration in this appeal.

2. To the crucially relevant and vital facts first. There is no serious dispute on facts. The claimant before the Tribunal is the appellant by the owner of the vehicle to drive the vehicle. That vehicle is admittedly a goods carriage and is covered by a valid policy of insurance. On 6-7-1997, the appellant was engaged in driving the vehicle.. He was to complete his schedule of work and get out of the vehicle on that day. The other driver of the vehicle was expected to come

and relieve him from duty. That driver did not come for work as expected. The owner of the vehicle wanted the appellant to go with the vehicle and fetch the other driver. The appellant drove the vehicle to the place where the other driver was expected to be available. He was traced. He was asked to get into the vehicle. The vehicle was driven back to the owner. On that lap of journey, the appellant continued to be carried in the vehicle. But the other driver was actually driving the vehicle. While the other driver was driving the vehicle, on account of rashness and negligence of such driver, the vehicle overturned. The appellant as well as some others who were travelling in the vehicle suffered injuries. Some of them succumbed to the injuries. All those who suffered injuries claimed compensation. The driver and the owner of the vehicle as well as the insurer were arrayed as respondents. It is the contention of the appellant that while he was being carried in the goods vehicle belonging to the owner of the vehicle in connection with his employment as driver of the vehicle (though he was not actually engaged in driving at the relevant time) the vehicle had met with an accident because of the negligence on the part of the driver of the vehicle. He hence claimed that he is entitled to get compensation. He asserted that not only the driver and owner of the vehicle but the insurer is also liable to compensate him.

3. The application for compensation was resisted. The 1st respondent - the owner of the vehicle remained *ex parte*. The 2nd respondent entered appearance. The 4th respondent - the real insurer (the 3rd respondent was originally shown as the insurer and he was later deleted from the array of parties) admitted insurance coverage of the vehicle; but contended that the policy does not cover the liability in so far as the appellant is concerned as he was only a gratuitous traveller in the goods carriage. In this appeal the real insurer alone is arrayed as the 3rd respondent.

4. The claim of the appellant was considered along with the claim for compensation raised by others who had suffered injuries. The Tribunal, by the impugned award, held that the owner and driver of the vehicle are liable to compensate the victims as the accident had taken place on account of the rashness and negligence of the driver of the vehicle. But it was held that liability in respect of the passengers in the goods vehicle (including the appellant) is not covered under the policy of insurance. Accordingly the insurer - the 3rd respondent herein, was absolved from liability, whereas respondents 1 and 2 were directed to compensate the victim for the loss suffered by him. Even though the appellant had claimed a total amount of Rs. 4,82,000/- as compensation, the Tribunal came to the conclusion that only an amount of Rs. 1,95,750/- is liable to be paid as compensation along with interest at the rate of 9% per annum.

5. The appellant has preferred this appeal contending, first of all, that the quantum of compensation awarded is not fair, just and reasonable. It is additionally contended that, at any rate, the insurance company is liable to pay

the amounts payable under the W.C. Act. In the light of proviso (i) to Section 147(1) of the Act, such amounts which are liable to be paid under the W.C. Act will have to be paid by the insurer and the balance amount will have to be recovered from respondents 1 and 2 contents Shri. K.J. Josemon, the learned Counsel who advanced arguments for the appellant.

6. We found the questions raised to be interesting. Both counsel advanced detailed arguments. Senior counsel Sri. Mathews Jacob was requested to assist the Court for a proper resolution of the questions raised. We have heard all counsel.

7. We shall, first of all, consider the challenge against the quantum of compensation fixed by the Tribunal. As stated earlier, the appellant had contended that he had suffered loss of Rs. 4,82,000/- but had limited the claim to Rs. 4 lakhs. He was aged 23 years on the date of the accident which took place on 6-7-1997. He claimed that as driver of the goods carriage vehicle of the owner, he was earning a monthly income of Rs. 6,000/- per mensem. He had suffered the following injuries.

- (i) Crush injury on the left leg below the knee.
- (ii) Fracture of the skull
- (iii) Fracture of both bones of the right forearm.
- (iv) Lacerations and abrasions all over the body.
- (v) Splitting of the ear lobe.
- (vi) Amputation of left leg below the knee.

8. Before the Tribunal the appellant was examined as PW1. Ext.A1 to A20 were marked on the side of the claimant. Several claims were disposed of by the same common award. Ext. B1 policy of insurance was marked by the Insurance Company.

9. The learned Tribunal, on an anxious consideration of all the relevant inputs, came to the conclusion that the appellant is entitled for an amount of Rs. 1,95,750/- (rounded off to Rs. 2 lakhs) as compensation as per the details shown below:

1. Loss of earning - Rs. 4,500/- 2. Damage to clothing & articles - Rs. 250/- 3. Transportation expenses - Rs. 500/- 4. Extra nourishment - Rs. 500/- 5. Bystander's expenses - Rs. 3,000/- 6. Pain and suffering - Rs. 20,000/- 7. Disability (Rs. 1,500/- x 12 x 18 x 50/100) - Rs. 1,62,000 Total - Rs. 1,95,750 ----- Rounded off to Rs. 2,00,000/-

10. Called upon to explain the nature of the challenge which the appellant wants to mount against the amounts awarded under the impugned award, the learned Counsel for the appellant, first of all, contends that the Tribunal was totally unrealistic in reckoning the monthly income at Rs. 1,500/- The learned

Counsel for the appellant contends that as an employee engaged in driving a heavy goods carriage, the Tribunal ought to have reckoned the monthly income of the appellant even in the absence of better evidence at a figure not below Rs. 4,000/- per mensem. In any view of the matter, reckoning the monthly income at Rs. 1,500/- is totally unjustified, contends the learned Counsel for the appellant. The learned Counsel for the appellant wants this Court to take note of the fact that the law from 1994 under the 2nd Schedule to the Motor Vehicles Act permits a presumption of prudence to be drawn even in favour of non-earning persons that their monthly income is Rs. 1,250/- The appellant is a specially skilled person competent and qualified to drive heavy goods carriage. The accident took place in 1997.

11. Even in the absence of any better evidence, we are satisfied in the circumstances of the case that it could have safely been assumed that the appellant was drawing a monthly income of Rs. 2,500/- (Two thousand and five hundred only). This would mean that the appellant would be entitled for higher amounts as compensation under the head of loss of earning and reduction in earning capacity consequent to physical disability.

12. The learned Counsel for the appellant further points out that the appellant has been disabled pursuing his employment as driver consequent to the amputation of his left leg below the knee. It is contended that virtually and actually 100% disability has resulted and the Tribunal erred in accepting the percentage of reduction in earning capacity as 50% only on the basis of a certificate issued by the Doctor. The learned Counsel contends that while computing the quantum of compensation payable for loss of earning capacity which is crucial and vital. There can possibly be no doubt or dispute that the appellant will not be able to work and earn his livelihood as a driver. In the circumstances of this case, we are satisfied that total permanent reduction in earning capacity must be assumed to have resulted. 100% and not merely 50% reduction in earning capacity can and has resulted, we agree.

13. The learned Counsel for the Insurance Company points out that the multiplier 18 has been taken by the Tribunal and this is incorrect. Going by the 2nd Schedule to the Tribunal and this is incorrect. Going by the 2nd Schedule to the M.V. Act, for persons aged between 20 and 25 years, 17 is the multiplier fixed and there is no justification in the facts of this case to adopt any higher multiplier. Even though, the 2nd Schedule is to be used only as a guide while computing compensation in a claim u/s 166 of the Act, we are satisfied that the contention of the learned Counsel for the Insurance Company can be accepted.

14. The learned Counsel for the appellant then contends that surprisingly the Tribunal has not awarded any amount under the head of loss of amenities. The appellant is a 23 year old young person. Amputation below the knee has resulted not only in permanent deprivation of his earning capacity but has also resulted in impairment of the quality of life which the appellant can aspire to lead hereafter. Considering the probable life expectancy, the appellant will have to endure the

impairment in the quality of life for at least 5 decades in future. Non-award of any amount under the head of loss of amenities is not justified, contends the learned Counsel. We find merit in that contention.

15. The above discussions lead us to the conclusion that the appellant is entitled to the following further amounts in addition to the amounts already awarded by the Tribunal:

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1. Loss of earnings - Rs. 3,000/- (Rs. 2,500/- x 3 minus Rs. 4,500/-) 2. Loss of amenities - Rs. 30,000/- (No amount awarded) 3. Loss/reduction in earning capacity - Rs. 3,48,000/- (Rs. 2,500/- x 12 x 17 minus Rs. 1,62,000/- i.e., Rs. 5,10,000/- minus Rs. 1,62,000/-)

Total - Rs. 3,81,000/-

(Total compensation is limited to Rs. 4 lakhs as claimed, i.e., a further amount of Rs. 2,04,250/-) - (Rs. 4,00,000/- minus Rs. 1,95,750)

Since the total claim is limited to Rs. 4 lakhs, though the appellant is found entitled to a total amount of Rs. 5,76,750/- (Rs. 1,95,750/- plus Rs. 3,81,000/-) we are not going into further details of the obligation of the appellant to acquire capabilities and skills in future to work and earn using the impaired physical faculties that he now possesses and thus reduce the loss suffered by him. Even if that aspect is taken into consideration, the amount of compensation claimed-Rs. 4 lakhs, does appear to us to be absolutely reasonable. Needless to say, the appellant shall be entitled to interest on the entire amount from the date of the petition at the rate of 7.5% per annum.

16. The next question is whether the Insurance Company is liable to satisfy this award or any part of the said award. The learned Counsel for the appellant contends that, in any view of the matter, the appellant must be held to be covered under the "Act only" policy in the light of the clear stipulations of proviso (i)(a) and/or (c) to Section 147(1) of the Act. We extract Section 147(1) of the Act below for the sake of clarity and easy reference:

147. Requirements of policies and limits of liability - (1) Order to comply with the requirements of the Chapter, a policy of insurance must be a policy which

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in Sub-section (2)

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place:

(ii) against the death of or bodily injury to any passenger of a public service

vehicle caused by or

arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required:

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee:

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation: For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(emphasis supplied)

To satisfy the requirement of Chapter XI relating to compulsory insurance, a policy of insurance must insure the owner against the liability specified under Sub-clauses (b)(i) and (ii) of Section 147(1) of the Act. The first proviso to Section 147(1) of the M.V. Act states that the policy shall not be required to cover liability in respect of the death or bodily injured sustained by an employee of a person insured by the policy, arising out of and in the course of his employment. But proviso (i) immediately takes out a class of persons from the sweep of the proviso and insists that liability arising under the Workmen's Compensation Act, 1923 in respect of the death of or a bodily injury of such employees must be covered if he falls under Sub-clauses (a) to (c) of proviso (i) to Section 147(1) of the Act.

17. The scheme of the Act is very evident. Liability mentioned under Clauses (i) and (ii) of Section 147(1)(b) of the Act must invariably be covered. But the policy shall not be required to cover actual claims for compensation of employees in respect of the death or bodily injury. But even in respect of such employees, if they come under Clauses (a) to (c) of proviso (i), the liability to the extent created under the W.C. Act of the insured must be covered under the compulsory "Act only" policy issued by the Insurance Company. In respect of persons falling

under (a) to (c) of proviso 1 of Section 147(1) , not the actual loss but only the amount payable under the W.C. Act will have to be paid and discharged by the Insurance Company. That appears to be the clear mandate of the Statute.

18. There is no contention that there is any additional contractual liability which will oblige the insurer to pay compensation to the appellant under proviso (ii) to Section 147(1) of the Act.

19. Thus, it all boils down to the question whether the appellant's claim against the owner under the W.C. Act is covered under the policy of insurance. For such coverage, he has necessarily got to answer Clauses (a), (b) or (c) of proviso (i) to Section 147(1) of the M.V. Act.

20. The appellant was employed for driving the vehicle. The employment was as driver. There is no dispute on this, though at the time when the accident took place, he was admittedly not driving the vehicle. He was an employee employed for driving the vehicle. Clause (i)(a) of the proviso covers only an employee "engaged in driving the vehicle". The question is whether the appellant who was employed for driving the vehicle; but was not engaged in driving the vehicle at the relevant time would be covered.

21. Relying on a decision of the Karnataka High Court in *New India Assurance Company Ltd. Vs. Sughra Bibi and Others*, , the learned Counsel for the appellant contends that the appellant would fall under Clause (a) of proviso (i). Our attention has been drawn to the decision of a Single Bench of this Court in *Oriental Insurance Co. Ltd. v. Davis* 2006 (4) KLT 1013. The language of Clause (a) of proviso (i) clearly shows that in order to attract coverage, the employee in question need only be "engaged in driving the vehicle" at the relevant time and an employee who was only employed for driving the vehicle but not engaged in driving the vehicle at the relevant time may not strictly be covered under Clause (a), contends the learned Counsel for the Insurance Company. It is alertly pointed out by the counsel that under the policy of insurance only one driver is covered and therefore the question of coverage being extended under Clause (a) to a person though a driver by qualification and engaged by the owner; but not driving the vehicle at the relevant time does not arise at all. We find the question to be interesting. But it is not necessary for us to go into that question in detail in this case as we feel that the appellant's claim for inclusion under Clause (c) alone need be considered in this case.

22. Clause (b) admittedly has no application. Clause (c) would apply if the accident arose out of and in the course of employment of the employee and such employee was being carried in a goods carriage. Admittedly the vehicle in the case is a goods carriage. Admittedly the appellant is an employee of the owner. Admittedly he was present in the vehicle in the course of his employment. Admittedly the accident arose out of his employment. Admittedly he is an employee who was being carried in the vehicle of his employer at the time of the accident.

23. We are, in these circumstances, satisfied that the appellant would squarely fall under Clause (c) of proviso (i) he being a driver employed by the owner who was being carried in the vehicle in connection with his employment at the time when the accident took place which arose in the course of and out of his employment. To us, no semblance of doubt occurs as to whether the appellant would fall within the sweep of Clause (c) of proviso (i) to Section 147(1) of the Act.

24. The next question is what is the amount liable to be paid under the W.C. Act? This claim has been staked u/s 166 of the Act. The option undoubtedly vests with the claimant to choose the forum u/s 166 of the Act or under the W.C. Act. He has chosen to stake his claim u/s 166 of the Act. He is justified in doing so as under the W.C. Act his compensation would be limited to the amounts specified u/s 4 of the said Act. u/s 166 of the Act a more elaborate enquiry is contemplated and the actual loss suffered can be claimed from the tortfeasors. We have already taken the view that the appellant is entitled u/s 166 of the M.V. Act for a total amount of Rs. 4 lakhs as claimed along with interest and costs from respondents 1 and 2, the driver and owner of the vehicle. He is entitled undoubtedly to recover that amount from respondents 1 and 2.

25. What is the amount which the insurer will be liable to pay to the appellant? To decide that question, we invariably have to decide the quantum of compensation payable under the W.C. Act. That shall be our next endeavour.

26. The accident took place on 6-7-97, The W.C. Act was amended with effect from 8-12-2000. Till then, whatever be the actual earnings of the employee, there was an upper limit and Rs. 2,000/- alone can be reckoned as the monthly income of the appellant for the purpose of computation of compensation under the W.C. Act. A contention is raised that the appellant must be held to be entitled for the benefit of the subsequent amendment. Though this contention is pressed into service with the help of the Supreme Court decision in *Rathi Menon Vs. Union of India*, we find ourselves unable to accept that contention in the light of the unambiguous statement of the law by the Full Bench of this Court in *United India Insurance Co. Ltd. v. Alavi* 1998 (1) KLT 951 (FB) and affirmed by the Supreme Court in *K.S.E.B. v. Valsala* 1999 (3) KLT 348 (SC). The Supreme Court was only following the earlier decision of the larger Bench in *Pratap Narain Singh Deo Vs. Srinivas Sabata and Another*. In the light of the decision of the Full Bench and the two decisions of the Supreme Court referred above we have no hesitation to agree that entitlement under the W.C. Act will have to be determined on the basis of the Status as it stood on the date of the accident and not on the basis of any later amendment to the Act. The amendment to the W.C. Act has no retrospective effect, it is well settled.

27. Another serious contention will now have to be considered. The appellant was a driver. He has suffered injuries in the accident. His left leg below the knee has been amputated. Though the physical disability is assessed by the Doctor to be 50% in Ext. A20 Medical Certificate, it is the case of the appellant that at the

time of the accident he was capable of driving alone and he is unable to undertake that income earning activity now. He therefore contends that he has suffered permanent total disablement as defined u/s 2(1) of the W.C. Act. Inasmuch as he has suffered total disablement, the compensation payable to him must be calculated in terms of Section 4(1)(b) of the W.C. Act. He is therefore entitled to an amount of Rs. 2,63,940/- (Rs. 2,000/- (upper limit) x 60/100 x 219.95 (relevant portion)). The learned Counsel contends that out of the total amount payable under the award passed u/s 166 of the M.V. Act, an amount of Rs. 2,63,940/- along with interest at the rate of 12% per annum from the date of the application to the date of payment is liable to be discharged by the Insurance Company.

28. The learned Counsel for the Insurance Company, on the contrary, contends that the physical disability of the appellant has been determined to be 50% in Ext. A20 Medical Certificate by a medical practitioner and, in these circumstances, as the said injury falls under Entry No. 21 in Part - II of the Schedule-I of the W.C. Act, the appellant is not entitled to contend that he has suffered total disablement u/s 2(1)(1). It is the contention of the Insurance Company that in respect of an injury falling under Part-II, it is impermissible ever to conclude that total disablement u/s 2(1)(1) has resulted. It is hence contended that the appellant would be entitled to get the reduction in earning capacity reckoned at 50% only under Entry No. 21 of Part-II of Schedule I and is not entitled to contend that he has suffered total disablement u/s 2(1)(1) of the W.C. Act. The insurer cannot, at any rate, be directed to pay any amount exceeding Rs. 1,31,970/- (2000 x 60/100 x 219.95 x 50/100), contends the counsel for the Insurance Company.

29. Various precedents have been cited before us. We prefer to analyse the Act primarily and then consider whether the conclusion which we want to reach is contra indicated by any binding precedents. That we feel, in the nature of the controversy raised, would be the ideal method.

30. It will be apposite straightaway to refer to the definition of "total disablement" in Section 2(1)(1) of the W.C. Act along with the proviso and to the definition of "partial disablement" in Section 2(1)(g) of the W.C. Act. We say so because we think that crucial assistance to understand the expression "total disablement" in Section 2(1)(1) will be available from the definition of "partial disablement" in Section 2(1)(g) of the W.C. Act. We extract Section 2(1)(g) and 2(1)(1) below.

Section 2(1): Definitions: (1) In this Act, unless there is anything repugnant in the subject or context,;

(g): "partial disablement" means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such

disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time: provided that every injury specified (in Part II of Schedule I) shall be deemed to result in permanent partial disablement.

Section 2(1)(1): "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workmen for all work which he was capable of performing at the time of the accident resulting 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 the said Part II against those injuries, amounts to one hundred per cent or more;]

(emphasis supplied)

31. u/s 2(1)(g) partial disablement if temporary in nature is to be ascertained by determining whether disablement reduces the earning capacity of the workman in the employment in which he Was engaged at the time of the accident. If the partial disablement is permanent in nature, what is crucial is not the employment in which the employee was engaged at the time of the accident. His earning capacity in ever employment which he was capable of undertaking at the time of accident will then have to be considered.

32. Section 2(1)(1) of the W.C. Act which defines "total disablement" also mandates that it will have to be ascertained whether the disablement incapacitates a worker for all work which he was capable of performing at the time of the accident.

33. "Total disablement" cannot be said to result if such disablement only incapacitates the workman for the work which he was engaged in at the time of the accident. Total disablement can be said to result only when the disablement incapacitates him for all work which he was capable of performing at the time of accident. Section 2(1)(g) when it defines "partial disablement" stipulates that every injury specified in Part-II of Schedule I shall be deemed to result in permanent partial disablement" The proviso to Section 2(1)(1) also stipulates that every injury specified in Part I of Schedule I must be deemed to result in total disablement. It is further stipulated that if the aggregate disabilities specified in Part II of Schedule I amounts to 100%, then also it must be deemed that total disablement has resulted. The statutory scheme has to be understood clearly. What is total disablement is defined clearly in the body of Section 2(1)(1) Primarily functionaries under the Statue have to ascertain whether disablement in a given case answers the definition of total disablement in the body of Section 2(1)(1). If it so answers there is no question of going to the proviso to ascertain whether deemed total disablement has resulted or not. The proviso to Section 2(1)(1) employs two deeming fictions. The purpose of proviso is very evident. The disablement in a given case may not answer the definition of total

disablement in the body of Section 2(1)(1). In such an instance, functionaries can fall back on the proviso and ascertain whether the disablement suffered can be deemed to be total disablement notwithstanding the fact that it does not answer the body of the definition in Section 2(1)(1). Reasonably understood, this and this alone can be the purpose of the proviso to Section 2(1)(1). Neither the proviso to Section 2(1)(1) nor the definition of Section 2(1)(g) can lead a prudent mind to the conclusion that an injury scheduled under Part-II can under no circumstances be said to result in total disablement. Peculiarities of the employment of an individual will have to be taken into the consideration. The question is not what he was actually doing at the time of the accident; but the question under the body of Section 2(1)(1) is as to what all work the employee was "capable of performing". If the work which the employee was capable of performing becomes impossible of performance by him because of any injury suffered by him (whether scheduled or not), he would still answer the body of Section 2(1)(1) and his disablement would be total disablement u/s 2(1)(1). The enabling fiction drawn under the proviso to Section 2(1)(1) or under the body of Section 2(1)(g) of the W.C. Act cannot lead us to the conclusion that merely because the injury is an injury scheduled in Part - II, that injury cannot amount to total disablement in the facts of a given case.

34. We agree that the question to be considered u/s 2(1)(1) is not what work the employee was actually doing at the time of the accident; but the question to be decided is what work "he was capable of performing at the time of the accident".

35. That takes us to the question of capability. A person can be said to be capable of doing only such work which he is competent to do, which he is qualified to do and which he has the expertise and experience to do. Merely because an employee will be able to lift some weight, it cannot be held that he is capable of performing the work of lifting the loads. He cannot then be held to be capable of doing loading and unloading work. Under the 2nd Schedule to the W.C. Act several employments are scheduled. It includes employment as the Master of a ship, under Clause (vi). It would be preposterous and puerile for law to assume that a Master of a ship even if he is totally deprived of the ability to do such work as Master of the ship cannot be held to be totally disabled for the reason that he like any other living individual can lift some weight and is hence capable of doing work as a loading and unloading worker. That is not the way to look at Section 2(1)(1) at all. The question is not what a person can possibly do; but the question is whether he is capable of doing any other work at the time of accident. There is a difference between the two concepts. Merely because a person may be able to (and can possibly) perform certain other functions it cannot lightly be assumed that he is capable of performing such work. Capability of performance, as stated earlier, must certainly bring with it the elements of competence, qualification, ability, expertise, experience and prior practice. It would be irrational to assume that because a driver who has lost his leg can perhaps operate a computer or work as a shop keeper (for which work he has no competence, qualification or experience) he will not be entitled to claim that he is

totally disabled u/s 2(1)(1) of the W.C. Act. We repeat that the question is whether despite his disability he is able to do any work which he was "capable of performing" at the time of the accident.

36. We felt that questions of human dignity and human rights are also involved. It would not be proper for the system to insist that such an unfortunate person who has been incapacitated to do all work which he was capable for performing must be asked to do work which is alien to him and which he is not familiar to perform merely because Section 2(1)(1) obliges the court to ascertain what work he was capable of performing. To assign a meaning to the expression "capable of performing" to include all work which a person can (or possibly) perform ignoring his qualification, competence and experience would be negation of the very purpose and scheme of Section 2(1)(1) of the W.C. Act. The fact that an unfortunate victim of the accident may or can acquire different capabilities in future is no reason to assume that he has such capabilities on the date of the accident and hold consequently that he has no permanent disablement u/s 2(1) (1) of the W.C. Act.

37. We will straightaway look at Section 4 of the W.C. Act. Section 4 deals with the manner in which compensation is to be calculated. We extract Section 4 of the W.C. Act below for easy reference.

Section 4: Amount of compensation: (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:

(a) Where death an amount equal to (fifty percent) results from the injury of the monthly wages of the deceased workman multiplied by the relevant factor;

or

an amount of (eight thousand rupees) whichever is more;

(b) Where permanent an amount equal to (sixty percent) of disablement results the monthly wages of the injured workman from the injury multiplied by the relevant factor;

or

an amount of (ninety thousand 32 rupees) whichever is more:

Explanation I-For the purposes of Clause (a) and Clause (b) "relevant factor" in relation to a workman means the factor specified in the second column of Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the workman on his last birthday immediately preceding the date on which the compensation fell due.

Explanation II-Where the monthly wages of a workman exceed (four thousand rupees), his monthly wages for the purpose of Clause (a) and Clause (b) shall be deemed to be (four thousand rupees) only;

(c) Where permanent (i) in the case of an injury specified in Part II partial disablement result specified in Part II of Schedule-I, such from the injury percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and

(iii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the 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;

Explanation I - Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.

Explanation II -In assessing the loss of earning capacity for the purpose of Sub-clause (ii), the qualified medical practitioner shall have due regard to the percentage of loss of earning capacity in relation to different injuries specified in Schedule I;

(d) Where temporary a half monthly payment of the sum disablement whether equivalent to twenty-five per cent of total or partial results mostly wages of the workman, to be from the injury paid in accordance with the provisions of Sub-section (2)

It deals with four different specific segments - (a), (b), (c) and (d). Section 2(a) of the W.C. Act deals with instances where the injury results in death. In this case we are not concerned with that. Clause (b) deals with injuries which result in permanent total disablement. Clause (c) deals with injuries which result in permanent partial disablement. Clause (d) deals with the injuries which result in total or partial temporary disablement. The scheme and the methodology of the statute clearly show that if an injury comes in Clause (b) it is not necessary at all to go to Clause (c). If the body of Section 2(1)(1) is answered by the nature of disablement, such a case has to be dealt with under Clause (b) and not Clause (c) at all. Only if no permanent total disablement-either actual or deemed, has resulted and only permanent partial disablement has resulted need one go to Clause(c) at all. Only then it need be considered whether Clause (1) or Clause (ii) of Section 4(1) would apply. In this view of the matter, we are convinced that in a case where injuries do not result in deemed total disablement under the proviso to Section 2(1)(1) the functionaries are obliged to consider whether such injury, whether scheduled in Part II of Schedule I or not, has resulted in total disablement. If it has resulted in total disablement, we repeat that the body of Section 2(1)(1) would apply, consequently one Section 4(1)(b) of the W.C. Act and not Section 4(1)(c) will apply.

38. In this view of the matter, the question to be decided is only whether the injury suffered by the appellant has resulted in total disablement i.e., whether it

has incapacitated him for all work which he was capable of performing at the time of accident.

39. What work was he capable of doing? There is no doubt that he was capable of performing the work of a driver. He has been totally incapacitated from doing that work. The only question that remains is whether there was any other work which he was capable of performing at the time of the accident. There is a significant absence of evidence to suggest or indicate that he had the capability of performing any other work at the time of the accident. As already referred to by us earlier, the question is not whether he can (or possibly) perform any other work; but the question is whether he has the requisite competence, qualification, expertise and experience to perform any other work. He asserts that he has none. There is no specific plea or evidence contra. We have no reason to assume that he has capability of performing any other work. Where a person is employed by the employer to do a particular item of work he must be held to be having the capability of performing such work and the burden must be held to be on such person who asserts so. to plead and establish that the victim was having the capability of performing any other work. We have no such plea or evidence in this case. In this view of the matter, we find it safe to conclude from the analysis of the statutory provisions and facts that the appellant has suffered total permanent disability as defined under the body of Section 2(1)(1) of the W.C. Act.

40. We shall now look at the precedents. The first decision that has been brought to our notice is the decision of the four Judge Bench of the Supreme Court in *Pratap Narain Singh Deo Vs. Srinivas Sabata and Another*, . That was the case of a carpenter. The carpenter's one arm was amputated. The Supreme Court was called upon to decide whether this injury, undoubtedly a scheduled injury under Part-II has resulted in total disablement as defined u/s 2(1)(1) of the W.C. Act to compute the compensation. The Supreme Court undoubtedly answered the question affirmatively and held that the workman had suffered total disablement. The relevant discussion appears in para-5 of the said decision which we extract below:

The expression "total disablement" has been defined in Section 2(1)(1) of the Act as follows:

(1) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement.

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

The injured workman in this case is carpenter by profession.... By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of

carpenter as the work of carpentry cannot be done by one hand only.

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to Item 3 of Part II of Schedule I, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less the 4 1/2 below the tip of olecranon. A new case cannot therefore be allowed to be set up of facts which have not been admitted or established.

41. A recent decision of the Supreme Court in Janardhan v. United India Insurance Co. Ltd. 2008 (2) KLT 995 (SC), the Supreme Court was again called upon to consider tills very question. That was a case where the employee-a driver, had suffered injuries which resulted in amputation of right leg upto knee joint. The Supreme Court also took note of the fact that the claimant could not do the work of a driver. The Supreme Court extracted para - 5 of Pratap Narain (supra) and proceeded to observe as follows:

4. Applying the ratio of the cited judgment to the facts of the present case we are of the opinion that the appellant herein has also suffered a 100% disability and incapacity in earning his keep as a tanker driver as his right leg had been amputated from the knee. Additionally, a perusal of Sections 8 and 9 of the Motor Vehicles Act, 1988 would show that the appellant would now be disqualified from even getting a driving licence.

42. We note that the Supreme Court in Janardhan has conveyed unmistakable indications as to how the decision in Pratap Narain Singh Deo is to be understood and how the ratio is to be applied. Detailed discussions, of course, are not there in either of these decisions as to the sweep and ambit of the expression "capable of performing" in Section 2(1)(1) of the W.C. Act. We also note that there is no detailed discussion as to whether every Part II injury would oblige the functionaries under the W.C. Act to reckon the same only as partial disablement and not total disablement. But the course followed by the Supreme Court and the reasons given in both these decisions clearly show that Part II Schedule I injury may also answer the definition of "total disablement" in Section 2(1)(1) (its body) and in such circumstance the mere fact that the injury happens to be a scheduled injury under Part II cannot persuade the functionaries under the W.C. Act to take the view that no total disablement has at all resulted. That is the only way to understand the rationale and the dictum in the two decisions. To us, it appears that the decision in Pratap Narain Singh Deo clearly implies this proposition of law; and there cannot be any doubt on the understanding of the rationale of the dictum. The last trace of such doubt, if any, as to what the ratio in Pratap Narain Singh Deo is and how it is to be applied is removed in the decision in Janardhan.

43. We must immediately note that our attention has been brought to other

decisions of the Supreme Court. The decision in Amar Nath Singh Vs. Continental Constructions Ltd., is relied on. It is trite that the course followed by the Supreme Court in a given decision is not to be reckoned as the dictum in that decision. Para-4 of Amar Nath Singh makes it crystal clear that the said decision does not declare any law. We extract the same:

4. Having gone through the papers and having heard learned Counsel on both sides, we are of the opinion that we should not be unduly fettered by the principles stated either in the Act or made in the course of the proceedings in this case and on an overall assessment of the matter, we think that out of Rs. 1,97,000/- deposited in the High Court towards compensation and penalty, which has been withdrawn by the appellant, a sum of Rs. 1,00,000/- shall be retained by the appellant while a balance of Rs. 97,000/- shall be refunded to the respondent in six months from today. It is open to the appellant to pay that amount of Rs. 97,000/- in different instalments if he sochooses. The appeal is disposed of accordingly modifying the order made by the Commissioner, Workmen"s Compensation and that of the High Court.

(emphasis supplied)

Amarnath does not stand against the conclusion reached by us following Pratap Narain Singh Deo and Janardhan.

44. Our attention has been drawn to the decision of the Supreme Court in Ramprasad Balmiki v. Anil Kumar Jain 2008 (4) KLT 312 (SC). We have gone through the decision in detail. In that decision the crucial question to be considered was whether the provision of the W.C. Act by incorporation has been brought into the M.V. Act as to control and regulate a claim u/s 166 of the M.V. Act. The point was answered against. We do not find anything in Ramprasad Balmiki to come to any different conclusion than what we have already arrived at by analysis of the statutory provisions and the two decisions of the Supreme Court in Pratap Narain Singh Deo and Janardhan. The decision in Grifan v. Sarbjeet Singh and Ors. 2000 (9) SCC 338 has also been referred to. The said decision has been referred to in Ramprasad Balmiki also. We have gone through Grifan We are unable to find any finding or conclusion in Grifan which is incongruent to the conclusion that we have already reached on the basis of the statutory provisions and the dicta in Pratap Narain Singh Deo and Janardhan.

45. Reliance is placed on the decision of the Full Bench of this Court in Vanajakshan Vs. Joseph, . It is crucial to note that the Full Bench had referred to Pratap Narain Singh Deo and Amar Nath Singh. The Full Bench had also not considered the question whether total incapacitation following a part II Injury, if it answers the description of total disablement, in the body of Section 2(1)(1) would cease to be total disablement for the mere reason that it is included in Part II of Schedule I. As we understand, the Full Bench after referring to Pratap Narain Singh Deo had declared the law only to the following extent:

...The judgment is not an authority for the proposition that the compensation has

to be determined only with reference to the work that was being done by the workman and not the loss in earning capacity.

The Full Bench did not consider the distinction between "capability" for performance of a work and the mere possibility of performance of any such work alien to a worker. How the decision in Pratap Narain Singh Deo is to be understood is made clear in Janardhana and if it be that the Full Bench had understood it differently, we are certainly bound to follow the subsequent application of the Pratap Narain Singh Deo ratio by the Supreme Court itself in Janardhan.

46. A contention is raised that if only partial disablement has taken place and the case has to be considered u/s 4(1)(c) of the W.C. Act to ascertain the quantum of compensation in respect of Part II Schedule I injury, only reduction in earning capacity shown in the Schedule can be reckoned and it is not possible to independently ascertain the extent of reduction in earning capacity. If an injury does not fall under Clause (1)(c)(i) the actual extent of reduction in earning capacity can be ascertained under Clause (1)(c)(ii). If that be the case, how is it that it can be contended that Part II injury can be assumed to result in total permanent disablement, queries the learned Counsel for the Insurance Company.

47. As understood by this Court in the decisions of the Full Bench in Vanajakshan Vs. Joseph, and Oriental Insurance Co. v. Mohammed 2002 (1) KLT 131, we may be bound to take the view that Part II injury cannot be shown to result in any reduction in earning capacity in excess of what is stipulated in Part II of Schedule I. We are not on that question now. In this case Part II of Schedule I injury is proved to have resulted in actual (not deemed) permanent disablement u/s 2(1) (1). We therefore have to decide the question u/s 4(1)(b) and not u/s 4(1)(c). In an appropriate case we would not have hesitated to refer the question to the Full Bench for decision for a resolution of this conflict. In the light of Pratap Narain Singh Deo and Janardhan and in the light of the language employed in Sections 2(1)(g) and 2(1)(1) it will have to be considered in an appropriate case whether every Part II injury must invariably be assumed to result only in the reduction of earning capacity specified in Schedule II or whether in appropriate cases evidence can be permitted to prove the actual reduction in earning capacity even in the case of partial disablement u/s 4(1)(c). We note that a decision of the High Court of Gujarat in State of Gujarat Vs. Rajendra Khodabhai Deshdia and Others, has elaborately considered this question. We feel that it will only be reasonable to take the view, as done by the Gujarat High Court in Rajendra Khodabhai Deshdia (supra) that a Part II injury can be deemed to result in the specified reduction in earning capacity even in the absence of any evidence. But even in respect of such an injury evidence can be adduced to show that in the given case it has resulted in total disablement or a higher percentage of reduction in earning capacity than what is specified in the Schedule. If it were the occasion, we would definitely have wanted the matter to be considered by a Full Bench in the light of the said decision of the High Court of Gujarat. But in the facts and circumstances

of this case the said question does not arise. It is not necessary for us in this case to resort to the exercise of referring on that aspect.

48. We may now formally the two questions referred earlier in para-1, before we conclude the judgment and issue the directions. We hold that:

(1) In the light of the very clear stipulations of Clause (c) of proviso (1) to Section 147(1) of the M.V. Act, a person employed as driver by the owner carried in the goods carriage vehicle in the course of his employment, though he was not actually driving the vehicle at the relevant time, is covered under the Act only policy to the limited extent of liability under the W.C. Act.

(2) The mere fact that an injury is included in Part I of Schedule I of the W.C. Act does not and cannot ipso facto lead a functionary under the W.C. Act to the conclusion that no total disablement has resulted at all. In each case the question will have to be considered whether the disablement has incapacitated the person to perform all work which he was capable of performing at the time of the accident and the capability for performance of work must be distinguished from mere possibility of performing such work. The question is not whether a person can (or possibly) perform such work but the question is only whether he is capable of performing such work on the date of the accident. The question is whether he has the requisite qualification, competence, capability, expertise and experience for performance such other work also.

It follows from the above discussions that the appellant is entitled to succeed.

49. In the result;

(a) This appeal is accordingly allowed in part.

(b) It is directed that the appellant shall be entitled to receive a total amount of Rs. 4 lakhs (i.e. Rs. 2,04,250/- (Rupees two lakhs four thousand two hundred and fifty only) more in addition to the amounts already awarded by the Tribunal) along with interest at the rate of 7.5% on the entire amount from the date of the petition to the date of payment from respondents 1 and 2. Costs shall be payable as stipulated under Rule 381(2) of the Kerala Motor Vehicles Rules, 1989 for the amount awarded.

(c) It is further directed that the 3rd respondent shall be liable to pay an amount of Rs. 2,63,940/- (Rupees two lakhs sixty three thousand nine hundred and forty only) along with proportionate costs and directed above and interest at the rate of 12% per annum from the date of the petition (i.e., 7-8-98) to the date of payment towards the said liability.

(d) The parties are directed to suffer their respective costs in this appeal.