
(2015) 10 GAU CK 0019
In the Gauhati High Court
Case No : MFA 36/2008

Bajaj Allianz General Insurance Company Ltd.

APPELLANT

Vs

Mridul Roy and Others

RESPONDENT

Date of Decision : 09-10-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 279, 338, 427

Workmens Compensation Act, 1923 — Section 2, 30, 4, 4(1)(a), 4(1)(c)(ii)

Citation : (2016) 1 ACC 158 : (2015) 4 GLT 799 : (2016) 1 LLJ 262

Hon'ble Judges : Nishitendu Chaudhury, J.

Bench : Single Bench

Advocate : R. Goswami, Advocate, for the Appellant; S.D. Saikia, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Nishitendu Chaudhury, J.—Bajaj Allianz General Insurance Company Limited, as appellant, has preferred this appeal under Section 30 of the Workmen's Compensation Act, 1923 (now renamed as Employees' Compensation Act, 1923 and hereinafter referred to as "the Act") challenging the award dated 29.10.2007 passed by the Commissioner, Workmen's Compensation at Kamrup in W.C. Case No. 79/2004 thereby directing the insurance company to make payment of Rs. 1,20,000/- to the claimant/workman along with interest at the rate of 9% per annum w.e.f. the date of the accident till deposit.

2. The brief facts of this appeal is that one Mridul Roy claiming to be driver with respect to a Maruti Van bearing registration No. AS-01/R-6013 belonging to opposite party No. 1, Mrs. Putuli Roy, was driving the vehicle on 12.04.2004 from Dhumarkur towards Bhawanipur when it met with an accident at Kurobaha near Bhawanipur Police outpost. Barpeta P.S. Case No. 177/2004 under Section 279 /338 /427 of IPC was registered in respect to this incident. According to the claimant, he sustained grievous injuries in the accident because of which he has been rendered permanently disabled from driving any vehicle anymore. He

claimed to be 24 years of age at the time of the accident and that he was receiving monthly salary of Rs. 4,500/-. He also disclosed that the vehicle was under valid insurance coverage of the O.P. No. 2, Bajaj Allianz General Insurance Company Limited vide policy No. 04043360. He claimed compensation of Rs. 14,00,000/- from the opposite parties.

3. On being notified, the O.P. No. 1 owner appeared and by submitting written statement admitted the averments on facts as to employment, salary and accident but disclosed that it was under insurance coverage of O.P. No. 2, Bajaj Allianz General Insurance Company Ltd. and so compensation, if any, is to be paid by the O.P. No. 2 only.

4. The O.P. No. 2, Bajaj Allianz General Insurance Company Ltd. which is the appellant herein filed a separate written statement denying all the averments made in the written statement and disclaimed its liability to make payment of any compensation whatsoever. It appears that the W.C. Commissioner did not frame formal issues but allowed the parties to lead evidence on their respective claims. The claimant examined two witnesses including himself. The claimant proved prescriptions as Ext. 1 to 5, X-ray advice as Ext. 6, medical certificate as Ext. 7, police report as Ext. 8, X-ray plates as Ext. 9 and 10, X-ray report as Ext. 11 and his driving license as Ext. 12. He reiterated the same story pleaded by him in the claim petition and deposed that the vehicle in question met with an accident on 12.04.2004 at about 4.55 p.m. when a truck hit the van from behind on the national highway No. 31. The Maruti Van fell down below the road resulting in injuries to his left shoulder joint and chest. There were fracture injuries as per X-ray report and plates referred to above. He claimed that because of the injuries he lost his job and was not in a position to pursue driving occupation anymore.

5. PW 2, Dr. Newton Kr. Das deposed in the same line as was done by the PW 1 and stated that he treated the PW 1 victim and certified him to have sustained fracture injuries rendering him physically disabled. Because of such injury, he lost earning capacity to the extent of 40-50%. But in course of cross examination, the doctor admitted that he did not keep in mind the provisions of the Act either while issuing the certificate or while making assessment of the loss of earning capacity.

6. The insurance company examined one Dilip Chandra Kalita as DW 1 who deposed on oath that he was appointed as investigator by the O.P. No. 2, insurance company and he accordingly made enquiries. He claimed to have recorded statements of the owner of the vehicle whereupon he was told that the claimant Mridul Roy was very much driving vehicle even during pendency of the proceeding. However, he stated that the accident was genuine and the police report was also true. But there was no mention about the injury anywhere in the police report.

7. The W.C. Commissioner considered the evidence of both sides and thereupon

rejected the claim of the workman to the extent that he suffered from permanent partial disability and so refused to make any award for compensation under Section 4(1)(c)(ii) of the Act. However, there being ample evidence on record as to his injuries and the treatment received by him, the W.C. Commissioner preferred to order for compensation under Section 4(1)(d) of the Act. In so doing, he made calculation under Section 4(2) of the Act for a period of 5 years which is the maximum period prescribed under the section for assessment of compensation. Accordingly, he ordered half monthly salary for 5 years and since the monthly salary was Rs. 4,000/- within the meaning of the Act, compensation was awarded for Rs. 1,20,000/- in all. Upon this amount, the W.C. Commissioner also allowed interest at the rate of 9% from the date of accident till deposit. This judgment and award passed on 29.10.2007 has been challenged by the insurance company before this court.

8. This court while admitting the appeal on 05.03.2008 framed the following substantial question of law:--

"Whether the learned Commissioner, Workmen's Compensation can without there being any evidence relating to the period of disability passed an award under Section 4(1)(d) awarding half monthly payment of salary for a duration of five years?"

9. I have heard Mr. R. Goswami, learned counsel for the appellant and Ms. SD Saikia, learned counsel for the claimant. I have perused the lower court records.

10. Mr. R. Goswami, learned counsel for the appellant, vehemently argues that the W.C. Commissioner did not have any material before him to arrive at a finding that the temporary disablement of the workman continued or was expected to continue for a period of 5 years. He submits that 5 years is the maximum period for which compensation under Section 4(1)(d) can be awarded but it cannot be a rule for all and any disablement. The W.C. Commissioner has to justify himself the period for which a workman remained physical disabled because of the accident and compensation is to be awarded for such period only subject to upper ceiling of 5 years. Mr. Goswami further argues that the W.C. Commissioner erred in law in directing the insurance company to make payment of interest at the rate of 9% per annum from the date of accident till deposit. He submits that the compensation fell due on the date of adjudication only and so even under the provision of Section 4A of the Act, appellant was entitled to make payment of the amount within a period of 30 days from the date of adjudication which is the date of the compensation falling due. The W.C. Commissioner could not have granted interest for the whole period from the date of accident, he argued.

11. Per contra, Ms. SD Saikia, learned counsel for the claimant would argue that even on the face of the evidence on record, the claimant was physically disabled till the case was disposed of. He appeared in person before the W.C. Commissioner who had occasioned to see the physical condition of the victim.

There were medical evidence like X-ray report and X-ray plates which supported the claim of the workman that he had suffered from fracture injuries over his body for which he was not in a position to drive a motor vehicle. This being the position, it was open to the W.C. Commissioner to arrive at a view that such injuries can warrant compensation for a period of 5 years and this is how the impugned judgment and award does not require any interference. She submits that the sole substantial question of law does not arise from the facts and circumstances of the case and consequently the appeal is liable to be dismissed.

12. Having gone through the lower court records it appears that the workman has placed on record the X-ray plates vide Ext. 9 and 10. There is also X-ray report showing that he suffered fractures on both the chest and the shoulder joint. Dr. Newton Kr. Das (PW 2) applied plaster on his person and it was kept for 45 days. Even after removal of the plaster he is unable to work as a driver and so he became unemployed since the date of accident. He claimed that he was paid Rs. 4,500/- per month by the vehicle owner. In course of cross examination, he disclosed that the X-ray was done on 14.04.2004 i.e. two days after the accident had taken place. He stated that he was aware as to the content of the medical certificate issued by the PW 2 about 2/3 months after the accident as it was obtained by his maternal uncle. However, he stated that plaster was applied by Dr. Newton Kr. Das and that he had not driving any vehicle till the date of deposition since the date of accident.

13. Dr. Newton Kr. Das is a Medical and Health Officer of Patacharkuchi P.H.C. He claimed to have examined the claimant on 14.04.2004 for the injuries and he found from the X-ray that neck of the humerus and 2nd and 3rd rib of the chest on the right side had been fractured. According to him, it amounted to permanent disability to the extent of 40-50% and the workman sustained loss of earning capacity to the same extent. The doctor identified Ext. 1 to 5 as his prescriptions and Ext. 9 to 10 as X-ray plates of the victim. But in course of cross examination, he stated that he did not assess the loss of earning capacity and that he did not take into consideration the provisions of the Workmen's Compensation Act while making the assessment.

14. What is discernible from the examination in chief and the cross examinations of these two witnesses is that there was an accident on 12.04.2004 in which the workman sustained injuries over his person. There were fractures on the second and third ribs of his right chest and there was also fracture on the neck of his humerus bone. The PW 1 specifically claimed that he did not drive vehicle till the date of deposition since the accident and so his disablement at least till the date of deposition and inability to drive vehicle cannot be doubted. No cross examination has been made by the insurance company to discredit this witness at least to this extent of facts. This being the position, physical disablement of the workman as held by the W.C. Commissioner did exist at least during the pendency of the proceeding i.e. till the impugned judgment and award was made.

15. The insurance company, of course, made an attempt to show that the

workman was never physically disabled and was very well driving vehicle even after the accident had taken place. DW 1 claiming himself to be an investigator deposed that the owner had disclosed to him about driving of vehicle by the claimant. But the insurance company has failed to examine the owner or any other person who had occasioned to see that the victim was driving vehicle during the relevant period. In the absence of specific deposition by a person who had seen the incident of driving, the evidence led by DW 1 as to driving of vehicle by the victim after the accident had taken place, will be no evidence in the eye of law. The oral evidence as to a fact can be given only by that person who has seen the fact to occur. The evidence of DW 1 to this extent, therefore, was rightly disbelieved by the W.C. Commissioner.

16. On totality of circumstances as referred to above, it cannot be doubted that the workman was physically disabled till the date of adjudication of the proceeding i.e. for a period of 3 years from the date of accident. But Mr. R. Goswami, learned counsel for the appellant, is correct to say that there is no evidence on record to come to a finding that there was likelihood for this disability to continue for another two years. This means that as on the date of adjudication, the W.C. Commissioner had no material in front of him to arrive at a finding that the workman was expected to be physically disabled for another two years in future. Such finding of the W.C. Commissioner, therefore, cannot be upheld. The reasonable finding in this respect on the basis of the material available on record can be that the claimant was physically disabled within the meaning of Section 4(1)(d) of the Act for a period of 3 years from the date of accident and till the date of adjudication. The substantial question of law is accordingly answered.

17. The argument of Mr. R. Goswami in regard to interest on compensation amount also deserves consideration. Section 4(A) of the Act provides that compensation under Section 4 shall be paid as soon as it falls due. The date as to when compensation under Section 4 would fall due has not been specifically mentioned in the statute. The compensation payable to workmen under Section 4 are classified under three heads. Section 4(1)(a) deals with compensation when the victim dies in the accident. The amount of compensation under such circumstances, would be an amount equal to 50% of the monthly wages of the deceased multiplied by the relevant factor depending upon his age. The employer knows that he is bound to make compensation under Section 4(1)(a) on the death of the workman and so under such cases he is not required to wait for assessment by any tribunal or W.C. Commissioner. The words "as soon as it falls due" in the context of section 4(1)(a) of the Act, therefore, would refer to the date of death of the workman if the death arises from the accident. But where it is a case of permanent total disablement and/or permanent partial disablement in that event, adjudication by statutory authority would be necessary. The schedule to the Act made under Section 2 and 4 thereof contains two parts. Part I deals with permanent total disablement and Part II deals with permanent partial disablement. In both these cases of scheduled injuries, not only the

description of the injury but the corresponding percentage of loss of earning capacity have also been laid down by the statute itself and so the adjudicating authority would be bound by such provisions. This being the position, so far as the scheduled injuries are concerned, the employer and for that the insurance company having contact of the insurance of employer may have reason to know the quantum of compensation to be paid by it even on the happening of such injuries. In those cases, it is possible to know that compensation has to be paid at such rate depending upon the nature of the injury. The words "as soon as it falls due" occurring under section 4A of the Act insofar as it relates to scheduled injuries under Part I and Part II to the schedule of the Act would be the date of the disablement and so in that event, the employer would be liable to make payment on such disablement itself. But where the injuries caused to the workmen are not mentioned in either of the two parts of the schedule in that event, the compensation would be as per the assessment made by qualified medical practitioner followed by adjudication of the statutory authority and so the date of falling compensation due in such cases would be the date of adjudication alone. This is because an employer or the insurer cannot anticipate the quantum of compensation before such an assessment is made by the adjudicatory authority. The Hon''ble Supreme Court in the case of National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another, considered the case of a non-scheduled injury and perhaps in view of the aforesaid reasons held the view that the compensation would be payable on the date of adjudication. On the other hand, in the case of Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, , the Hon''ble Supreme Court had the occasion to consider the case of a scheduled injury and that is why the Hon''ble Supreme Court held the view that compensation would fall due on the date of accident itself. However, after taking a holistic view of the matters, the Hon''ble Supreme Court again considered the aspect in the case of Oriental Insurance Company Limited v. Md. Nasir and another and held that independent of the provision of Section 4A , the claimant would be entitled to interest at the rate of 7.5% from the date of filing claim petition till the date of the award and thereafter if the amount is not paid, the workman would be entitled to further interest at the rate of 12% per annum. The further interest for the period beyond adjudication would be as per the order of the Commissioner in accordance with the provision of law. This is because granting of interest from the date of accident or from the date of filling of application is a matter of discretion of the W.C. Commissioner till the date of adjudication but once adjudication is made in respect to a non scheduled injury in that event, the employer would be entitled to make the deposit within a period of 30 days from the date of its falling due. During this period of 30 days, the question of granting interest at the rate of 12% under Section 4(A) of the Act cannot arise. Section 4(A) pre-supposes a further adjudication after expiry of 30 days. This is because Section 4(A)(3) gives a discretion to the Commissioner to direct further sum not exceeding 50% by way of penalty if in his opinion there was no justification for delay in making payment within a period of 30 days from the date of adjudication. This means that if the compensation is not paid within a

period of 30 days from the date of adjudication in case of a non-scheduled injury in that event, the employer would be called upon to show cause as to why such further amount in addition to compensation and interest should not be allowed against him and if the employer fails to satisfy the Commissioner for reasons of delay, in that event, the Commissioner shall (and not may) direct that a further sum not exceeding 50% of the compensation would be payable by the employer in addition to arrears and interest. Section 4A(3) further provides under sub-clause (a) that the W.C. Commissioner shall direct the employer to make payment of simple interest at the rate of 12% or a such higher rate not exceeding maximum of the lending rates of any scheduled bank as may be specified by the Central Government by notification in Office Gazette, of the total amount due if the payment is not made within a period of 30 days from the date of falling due. It does not appear that directing payment of simple interest at the rate of 12% on the whole arrear would require any adjudication and/or issuance of show cause notice. This is because Section 4A(3) mandates that the Commissioner shall direct such payment of interest if the employer is in default of paying the compensation within one month from the date of its falling due. Issuance of show cause notice will be necessary only for directing payment of further sum in addition to amounts of arrears and interest.

18. In the case in hand, the insurance company has already deposited the whole amount with the jurisdictional W.C. Commissioner and this is why the respondent claimant could withdraw a sum of Rs. 50,000/- from this. This being the position, granting of further penal compensation under Section 4A(3)(b) may not arise in the present case.

19. Consequently, it is to be held that assessment of compensation payable to the respondent claimant has to be made afresh as follows:

$50\% \times \text{Rs. } 4000/- \times 42 \text{ months} = \text{Rs. } 84,000/-$

The claimant is entitled to compensation of Rs. 84,000/- in all out of which the claimant has already withdrawn a sum of Rs. 50,000/-. The claimant shall be entitled to withdraw the balance compensation from the amount already deposited by the insurance company with the jurisdictional W.C. Commissioner and the balance amount shall be returned to the insurance company.

20. Following the ratio of the case of Md. Nasir, the workman shall also be entitled to interest at the rate of 7.5% from the date of filing of application till the deposit was made. The workman shall be entitled to withdraw compensation along with such interest from the W.C. Commissioner out of the amount deposited by the insurance company and the balance amount shall be returned, if any, to the appellant insurance company.

21. Appeal stands disposed of. No order as to costs.