

(1987) 02 OHC CK 0020

In the Orissa High Court

Debaki Swain and Another

APPELLANT

Vs

Executive Engineer, Electrical Division, Orissa State Electricity
Board

RESPONDENT

Date of Decision : 27-02-1987

Acts Referred:

Employees Compensation Act, 1923 — Section 3, 30, 4

Citation : (1987) 2 ACC 18 : (1988) ACJ 836

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Judgement

D.P. Mohapatra, J.—This appeal u/s 30 of the Workmen's Compensation Act, 1923 (for short "the Act") was filed by the widow and minor son of Khageswar Swain, a Junior Artisan "B"(Helper) under the Orissa State Electricity Board in its Bhawanipatna Electrical Division challenging the order of the Commissioner under the Act dated 21-6-1982 rejecting the application of the said workman for compensation. The application was filed by Khageswar alleging, inter alia, that on 12-12-76 when he was discharging duty as a helper to the lineman, P W 1., in front of the CD. M.O.'s residence, the latter wanted him to hand over a tube light for fitting it up on the electric pole. He went up the ladder, received a shock from the electric pole, fell down and sustained injury on his spinal cord which resulted in paralysis of his lower limbs. The applicant claimed a sum of Rs. 26,880/- on the basis that he suffered a total permanent disablement due to the injury sustained in course of duty.

2. The application was contested by the respondent. The respondent denied his liability to pay any compensation stating that it was not the duty of the applicant who was only a labourer, to work on the electric pole with the lineman. Since the applicant had done the work unauthori-sedly the employer was not liable to pay any compensation. The respondent took the further stand that though the petitioner sustained injury on his spinal cord, he was cured by medical treatment. After obtaining a fitness certificate from the C.D.M.O., he resumed

service. He neither lost his job nor were his emoluments reduced after the accident. He was given facilities of earned leave, medical leave, etc. as permissible under the service rules. Indeed, the applicant continued in his job till 30th of August, 1979, when he died a natural death.

3. On behalf of the applicant, two witnesses were examined--Gokul Prasad Das (PW1), Lineman, Grade "B", to whom Khageswar was attached as a helper at the time of the accident, and Debaki Swain (PW2) wife of the applicant. A letter of the C.D.M.O., Kalahandi dated 27th of June, 1978 addressed to the Executive Engineer, Electrical Division, Bhawanipatna stating that the applicant suffered from paralysis of both the lower limbs and was walking with difficulty with the help of the poles and further that the paralysis caused as a result of fall from the electric pole while on work resulted in loss of hundred per cent of his earning capacity, was filed on behalf of the applicant. No oral evidence was led on behalf of the opposite party. A certificate dated 6-2-78 from the C.D.M.O, Kalahandi showing that the applicant workman was fit to join duties was filed on his behalf.

4. The Commissioner, on consideration, framed two questions for decision. One, if the workman was working unauthorisedly on the electric pole and he was negligent; and secondly, if the workman was entitled to compensation on account of the alleged permanent partial disablement. On consideration, he answered the first question in the affirmative and the second in the negative. The Commissioner took the view that the workman, Khageswar, acted negligently by doing work which was not assigned to him by the employer and further that he was all along in the employment under the Department and his earning capacity was never impaired. On these findings, he rejected the application for compensation. It may be noted here that after the death of the applicant Khageswar, the appellants were substituted in his place as his legal heirs.

5. The learned Counsel for the appellants challenged both the aforementioned findings of the Commissioner. It was his contention that the findings were vitiated due to erroneous approach and mis-construction of the statutory provisions.

6. On careful consideration, I am of the view that the contentions raised on behalf of the appellants have ample force. The liability of the employer for compensation is dealt with u/s 3 of the Act. Sub-section (1) thereof lays down that if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter. Exceptions to the aforesaid provision are contained in the proviso which reads as follows:

Provided that the employer shall not be so liable --

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days.

(b) in respect of any injury, not resulting in death, caused by an accident which

is directly attributable to --

- (i) the workman having been at the time thereof under the influence of drink or drugs, or
- (ii) the wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workman, or
- (iii) the wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen.

XX XX XX

7. In the present case, it is the admitted case of the parties and it is also clear from the evidence of the lineman, P.W. 1, that Khageswar was allotted the duty of a helper and was attached to the witness at the time of the accident. As a helper he was required to help the lineman in his work. P.W. 1 has further stated that when he was trying to repair a tubelight standing on the ladder, he asked the helper to give him a tubelight for fitting it up on the pole. Carrying out the said direction, the helper (Khageswar) climbed up the ladder and while handing over the tubelight received electric shock on touching the pole, fell down and sustained injury on his spinal cord. It is thus evident that the workman suffered personal injury due to the accident arising out of and in course of his employment. The objection filed on behalf of the respondent shows that a case under the exception embodied in the proviso (b) (ii) quoted above was sought to be made out. This exception could come to the aid of the employer if it was established that the injured wilfully disobeyed an order expressly given or a rule expressly framed prohibiting him from performing the type of work which he was doing at the time of the accident or containing any express instruction regarding safety measures to be taken by him. Merely referring to the duty chart to show that the particular work was not assigned to him is not sufficient to bring the case within the exception and to exonerate the employer from liability to pay compensation to the injured workman. Further, the practical side of the case cannot be overlooked. As a helper, whose duty was to help the lineman, Khageswar had to abide by the directions of the latter. P.W. 1 categorically stated that he required the helper to get him the tubelight which was lying on the ground and for that purpose the applicant had climbed up the ladder. It is therefore clear that the findings of the Commissioner that the work performed by the applicant at the time of the accident was not a duty assigned to him, it was an unauthorised act and further that the applicant was negligent in doing such work are clearly erroneous. Therefore, the first contention raised on behalf of the appellants has to be accepted.

8. Coming to the question of the amount of compensation, the matter is dealt with in Section 4 of the Act, relevant portions of which are quoted hereunder:

4 (1) Subject to the provisions of this Act, the amount of compensation shall be

as follows, namely: xx xx xx (b) Where permanent total an amount equal to fifty per cent, disablement results of the monthly wages of the injured from the injury workman multiplied by the relevant factor:

Or

an amount of twenty four thousand 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 proceeding the date on which the compensation fell due.

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

(c) Where permanent partial (i) in the case of an injury specified disablement results in part II of Schedule I, such percentage from the injury 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 (ii) 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 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 purposes 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."

9. On this aspect of the case, as noticed earlier, the respondent took the stand that since Khageswar continued in his job with no less in emoluments drawn by him even after the accident, his earning capacity was not impaired in any manner and therefore he was not entitled to any compensation. The factual position that Khageswar continued to serve under the respondent and on the same emoluments even after the accident as he was drawing before is not in dispute. But the question is whether in such circumstances it can be said that the workman is not entitled to any compensation even if it is found that he suffered disablement of a permanent nature.

10. A similar question arose before the Division Bench of the Calcutta High Court in the case of Ram Naresh Singh v. Lodhna Colliery Co. (1920) Ltd. reported in

1973 LabIC 1656. Therein the court observed that in considering the loss of earning capacity in the case of a "permanent partial disablement" the comparison between the wages drawn by the workman before and after the accident from his employer at the time of the accident is not a decisive factor. What has to be found out is the reduction in earning capacity suffered by the workman in every employment which he was capable of undertaking at the time of the accident. This has necessarily to be a national figure for which it is not possible for the workman to give precise factual evidence. In fact, this notional assessment of loss in earning capacity with regard to every possible employment is the task of the judge who, in such cases, is the Commissioner for the Workmen's Compensation. In certain cases, of course, it may be possible to adduce some evidence on facts to help the assessment. But it is not possible that assessment of such a notional loss can always be made purely on the basis of factual evidence. Further the Court formulated the following principles for determination of loss in earning capacity:

- (1) Earning is not the same as earning capacity.
- (2) Rise in earning may be because of various factors and rise in wages is not, therefore, decisive proof that there is no loss of earning capacity.
- (3) Loss of physical capacity is not co-extensive with loss of earning capacity.
- (4) Loss of physical capacity or physical incapacity may be relevant in assessing to what extent there is loss of earning capacity from "every employment" which the workman was capable of undertaking at the time of the accident or re-employment in which he was engaged at that time.

11. The principles laid down in the above case were followed by the same Court in the case of *Sarat Chatterjee & Co. (P) Ltd. v. Md. Khalil*, reported in 1979 LabIC 401 and the Rajasthan High Court in the case of *Executive Engineer, P. W.D. (R&B), Udaipur and Anr. v. Narain Lal*, reported in 1977 LabIC 1827.

12. Keeping in view the principles laid down in the decisions referred to above, the evidence of PW 2, the wife of the deceased workman, becomes relevant. In her statement she has stated that the deceased received fracture injury on his backbone due to fall from the ladder. He was hospitalised for about twelve days. After being released from the hospital, he was not able to walk properly for which he was taking support of a stick. She has further stated that her husband was getting pain all along at the back because of the injury and she used to apply oil and hot foment to relieve him of the pain. He was not able to discharge his normal duties because of the injury. It is further in her statement that he had been partially disabled. He was not able to run and not able to lift a ladder even after he resumed duties. There is no reason not to accept the testimony of this witness which stands uncontroverted. From the evidence discussed above. It is clear that the workman was not able to discharge his duties properly, he was having difficulty in walking, he was unable to lift a ladder and he was often suffering from physical pain. All these make it clear that the workman suffered

loss of earning capacity. As was observed by the Calcutta High Court in Ram Naresh Singh's case (supra), the fact that the workman continued to hold his old post and was getting his old wages was because his employer was giving it to him by way of grace, but on such conduct on the part of the employer it would not be just and legal to deprive the workman of his right to get compensation under the Act.

13. The next question that falls for consideration is what is the percentage of loss of earning capacity. From the facts discussed above, it is clear that the workman did not suffer permanent total disablement. The disablement suffered by him could be said to be only permanent partial disablement. Admittedly, the injury suffered by him is not one of those specified in Part II of Schedule I. Therefore, the claim would come u/s 4(1)(c)(ii) of the Act which provides that 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 permanently caused by that injury, should be the amount of compensation. In this regard, there is practically no evidence led to show the percentage of loss of earning capacity which the workman could be said to have suffered due to the injury caused by the accident. Again referring to Ram Naresh Singh's case (supra), in the facts of the present case, it would be difficult for the appellants to lead precise evidence on the point. The task has become more difficult due to the death of the workman during pendency of the proceeding. Considering the facts and circumstances of the case, the impact of the injury on the injured and the nature of the disablement suffered by him as stated by his wife, I consider it reasonable to assess the percentage of loss of earning capacity at 30 percent. Calculated on that basis, the amount of compensation comes to Rs. 8,064/-.

14. One other aspect that needs consideration is whether the wife and the son of the deceased workman are entitled to receive compensation under the Act after the death of the injured workman. On the face of it, it may appear that since the claim for compensation was for personal injury sustained by the concerned workman, the claim would abate on his death. In my view, this would not be a correct approach. The injured workman had the statutory right to receive compensation amount as specified under the statute. The quantum was to be calculated as per the schedule attached to the statute. The liability to pay compensation, to the workman suffering injury was created immediately on occurrence of the accident and the claim must be taken as debt payable to the workman which was not a personal right, but a right that passed on to the heirs of the workman on his death. Therefore, the claim for compensation could not be said to have abated due to the death of the workman. Therefore, the appellants as the legal representatives of the deceased workman had the right to continue the proceeding. This view gains support from the decisions of the Bombay High Court in the case of Margarida Gomes and Another Vs. Mackinnor Mackenzie and Co. Pvt. Ltd., and in the case of Manubhai Kikabhai and Co. Vs. Babajee Rajaram, .

15. On the analysis in the foregoing paragraphs, it has to be held that the claimants are entitled to receive the sum of Rs. 8,064/- from the respondent towards compensation for the permanent partial disablement suffered by the workman.

16. The Miscellaneous Appeal is allowed in terms aforesaid. Both parties will bear their respective costs of this appeal.