
(1997) 06 OHC CK 0010
In the Orissa High Court
Case No : M.A. No. 221 of 1994

Divisional Manager, United India Insurance Co. Ltd.	APPELLANT
Vs	
Bhagaban Das and Another	RESPONDENT

Date of Decision : 20-06-1997

Acts Referred:

Employees Compensation Act, 1923 — Section 30, 4

Citation : (1999) ACJ 812

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : Ajaya Kumar Mohanty and S.N. Satpathy, for the Appellant; R.N. Mohanty, B.N. Rath, S.K. Pradhan and M.K. Panda, for the Respondent

Final Decision : Allowed

Judgement

P.K. Mohanty, J.—This is an appeal by the insurer, the United India Insurance Co. Ltd. u/s 30 of the Workmen's Compensation Act, 1923 against the order of the Commissioner for Workmen's Compensation, Orissa, Cuttack, the Joint Labour Commissioner, Orissa at Bhubaneswar, awarding a sum of Rs. 37,091.60 as compensation and directing the appellant to deposit the above amount, etc.

2. The short facts leading to the present appeal are that while claimant-respondent No. 1 was working as a labourer on the truck No. AXX 4877 belonging to Pritam Singh, the respondent No. 2, he sustained fractures on his right forearm, dislocation of right shoulder joint, grievous injuries on his right forehead and other injuries on account of the accident on 29.12.1990 at 4.20 p.m. near Talakhota Chhak on the National Highway No. 5 under Jatni Police Station. It is claimed that the accident and the resultant injuries were occasioned in course of his employment. The claimant alleged that as a labourer of the said truck he was getting Rs. 900 per month towards his wages and was aged 25 years at the time of the accident and due to the accident he became permanently disabled and unemployed. The owner of the truck was impleaded as opposite party No. 1 and the insurer United India Insurance Co. Ltd. as opposite party No.

2.

3. The owner of the offending vehicle did not appear in spite of notice. However, the insurer, United India Insurance Co. Ltd., appeared pursuant to the notice and filed its written statement denying all the averments made in the claim statement.

4. The claimant examined 8 witnesses including himself and filed some documents like certified copies of F.I.R., charge-sheet, seizure list, zimanama and M.V.I. Report marked as Exhs. 1 to 5 respectively, the original outdoor ticket from S.C.B. Medical College and Hospital, Cuttack, marked as Exh. 6, the original prescriptions were marked as Exhs. 7 to 9. The claimant also filed disability certificate marked as Exh. 10 from the treating physician and the X-ray plate marked as M.O.I.

5. The learned Commissioner for Workmen's Compensation has recorded that the applicant was working as labourer in truck No. AXX 4877 and sustained injuries in the accident which arose out of and in course of his employment. It was further held that the applicant was working as labourer on the offending truck and thus a workman under the provisions of the Workmen's Compensation Act, 1923. The Commissioner further determined a sum of Rs. 37,091.60 as compensation and opposite party No. 2, the United India Insurance Co. Ltd. being the insurer of the vehicle under a valid policy covering the date of accident is to pay the compensation amount to the applicant under the indemnity clause with interest, etc.

6. The Divisional Manager, United India Insurance Co. Ltd., Saheed Nagar, Bhubaneswar has preferred this appeal u/s 30 of the Workmen's Compensation Act mainly on the ground that the Commissioner having not framed any issue on the question of loss of earning capacity of respondent No. 1 due to the injuries caused in the accident and an issue on the question regarding the valid insurance of the vehicle the award is not sustainable in law. It is further the case of the appellant that the loss of earning capacity having not been proved and certified by a qualified medical practitioner in terms of Section 4(1)(c)(ii), the determination of compensation is ex facie illegal and thus is liable to be set aside.

7. Mr. Ajaya Kumar Mohanty, learned Counsel for the appellant insurer contends that the applicant-opposite party No. 2 having specifically denied the insurance cover of the vehicle in question and the claimant nor the owner of the vehicle having proved to the satisfaction of the Commissioner that the vehicle in question was validly insured with the appellant company, covering the date of accident, the Commissioner could not have come to a finding that the vehicle in question was insured with the appellant company, taking a clue from the certified copy of the seizure list which neither proves the policy nor was a document certifying the existence of such an insurance policy. Mr. Mohanty further contends that in view of the provisions of Section 4(1)(c)(ii) of the Industrial Disputes Act (Sic. Workmen's Compensation Act), the loss of earning capacity has to be

certified only by a qualified medical practitioner and in the present case the qualified medical practitioner having not proved the loss of earning capacity and having only stated and granted a certificate Exh. 10 with regard to the physical disability only, the finding of the Commissioner with regard to the loss of earning capacity is bad in law and cannot be sustained.

8. Mr. R.N. Mohanty, learned Counsel appearing for respondent No. 1, on the other hand, raises first the question of maintainability of the appeal u/s 30 of the Workmen's Compensation Act. It is his contention that the only ground on which the insurance company challenges the award being with regard to the assessment of loss of earning capacity an appeal u/s 30 is not contemplated that being a question of fact and not a substantial question of law involved in the appeal. Mr. Mohanty further contends that in the written statement the appellant has never taken such a plea nor a suggestion has been given while cross-examining the claimant or the doctor regarding assessment of loss of earning capacity, inasmuch as the insurer has agreed that the doctor's opinion is correct and on such basis compensation should be paid. It is further contended that the assessment of percentage of physical disability is the most relevant factor for determining the loss of earning capacity. The doctor having elaborately discussed regarding the nature of injuries and percentage of physical disability, the impact of disability on the nature of the work which he was doing at the time of accident and also taking into consideration the evidence of the claimant and the argument advanced on behalf of the insurance company, the Commissioner having awarded the compensation, he has committed no illegality nor any gross mistake which can be treated as a substantial question of law. The insertion of the words "assessed by the qualified medical practitioner" in Section 4(1)(c)(ii) of the Workmen's Compensation Act is not mandatory in nature and it is just a guideline for the courts to arrive at a just conclusion. The explanation II provides that when a doctor will assess the loss of earning capacity he will do the same on the basis of injuries specified in Schedule 1 which is totally impracticable. Mr. Mohanty has referred to some decisions including the decision of the Apex Court in Administrator, Municipal Committee, Charkhi Dadri and another Vs. Ramji Lal Bagla and others, , to contend that even if the percentage of disability has not been assessed by the doctor the court in order to come to speedy justice to the poor workman for the benefit under the Act, should assess the loss of earning capacity itself and award the compensation.

9. Having heard the learned Counsel for the parties, the first question that needs consideration is, whether in view of the pleadings of the parties and the findings recorded by the Commissioner, Workmen's Compensation, the present appeal u/s 30 at the instance of the insurer is maintainable. Section 30 of the Workmen's Compensation Act, 1923 contemplates an appeal to the High Court from the order of the Commissioner enumerated u/s 30, Clauses (a) to (e) of the Act. The first proviso to Section 30 prescribes that no appeal shall lie against the decision of the Commissioner unless a substantial question of law is involved in appeal. A Division Bench of this Court in Oriental Insurance Co. Ltd. Vs. Gajendra Prusty

and Another, , has already held that the loss of earning capacity is the sine qua non for grant of compensation. The mode of assessment of loss of earning capacity and the person competent to assess it have been provided in Section 4 of the Act. While judging the loss of earning capacity, the basis of sound principle of medical science and assessment done by a qualified medical practitioner plays a vital role, who is a "qualified medical practitioner" has also been defined under the Act. The degree of disability and loss of earning capacity are not synonymous. There must be a basis for it, but not mere guess work and as such while doing assessment of the loss of earning capacity the qualified medical practitioner will have due regard to different injuries specified in Schedule 1. If the Commissioner does not keep in view the requirement of law and passes an award such an award involves substantial question for determination in an appeal and as such an appeal lies to this Court as contemplated u/s 30 of the Workmen's Compensation Act.

10. On the question of quantum of compensation awarded in the case nothing much can be said in absence of the specific evidence of the qualified medical practitioner in terms of Section 4(1)(c)(ii) of the Act. On a reading of the judgment of the Commissioner and the evidence of PW 3 the doctor, it appears that the doctor has not assessed the loss of earning capacity while determining the physical disability of the claimant and has remained satisfied with assessing the physical disability. The certificate granted by PW 3 Exh. 10 also speaks of the physical disability only and not the loss of earning capacity. Mr. R.N. Mohanty, learned Counsel for the respondent has moreover urged that the provisions of Section 4(1)(c)(ii) are only directory and not mandatory and even in the absence of the evidence of the doctor with regard to the loss of earning capacity the court can assess the loss.

11. In view of the specific requirement of the provision of Section 4(1)(c)(ii) of the Act that the loss of earning capacity is to be assessed by a qualified medical practitioner it cannot be said to be a mere formality. The qualified medical practitioner also cannot assess the loss of earning capacity in his guess work but the nature of injuries, the percentage of physical disability, the capacity of the injured to perform the nature of work with specific reference to the type of work he was engaged in and several other such factors to come to a finding with regard to the loss of earning capacity. In that view of the matter, in absence of the evidence of the doctor in that regard it is not permissible for the court to find out only from the evidence of physical disability the extent of loss of earning capacity. The Commissioner, Workmen's Compensation in the present case at hand having assessed the loss, without any specific evidence of the doctor, as required under law, the award/ judgment is not sustainable in law.

12. Now coming to the contention of Mr. Ajaya Kumar Mohanty with regard to proof of insurance policy, it is to be noted that in the written statement filed by the insurance company no specific plea has been taken that the offending vehicle was not under the insurance cover of the appellant at the relevant time of

accident. In para 7 of the written statement of opposite party No. 2 (appellant) it has only been stated that at present the opposite party is unable to admit the interest of Mr. Pritam Singh over truck No. AXX 4877 unless, the original papers pertaining to insurance policy and its validity are disclosed and proved, etc. The claimant produced the certified copy of seizure list marked as Exh. 3 which discloses that certificate of insurance of United India Insurance Co. Ltd. No. 030300/31/66/00473 in favour of vehicle No. AXX 4877 is valid up to 24.4.1991 (Cal. Division-III). The reference was also available in the zimanama, marked as Exh. 4 in details about the policy. If the appellant in fact was disputing the insurance policy it could have taken such a stand in additional written statement or even at the time when it was examining its witnesses. That having not been done nor the insurance cover having specifically been denied such a plea at the appellate stage would not be permissible to be raised for the first time. I, therefore, reject the contention of the learned Counsel on that score.

13. In the result, I allow the appeal, set aside the impugned award of the Commissioner and remit the matter back to the Commissioner, Workmen's Compensation-cum-Joint Labour Commissioner, Orissa for fresh disposal of the claim application after allowing the parties to lead or adduce any further evidence only on the question of loss of earning capacity of the claimant. The Commissioner is further directed to dispose of the matter within a period of two months from the date of receipt of the order.