

(2011) 04 KAR CK 0152

In the Karnataka High Court

Case No : M.F.A. No. 3578 of 2009 A/W Miscellaneous Cvl. No. 8352 of 2009 and M.F.A. No. 2274 of 2009

Divisional Manager, United India Insurance Co., Ltd.,
Divisional Office, 34/3, M.M.K. Complex, Akkamahadevi
Road, P.J. Extension, Davangere - 577002

APPELLANT

Vs

Syed Dada Mohammed and Kowsar Nayaz
 Syed Dada
Mohammed Vs Kousar Nayaz and The Divisional Manager
United India Insurance Co. Ltd., Divisional Office,
Akkamahadevi Road, Davanagere - 577001

RESPONDENT

Date of Decision : 12-04-2011

Acts Referred:

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

Citation : (2011) 04 KAR CK 0152

Hon'ble Judges : S.N. Satyanarayana, J

Bench : Single Bench

Advocate : A.N. Krishnswamy, in M.F.A. No. 3578/2009 assisted with Misc. Cvl. No. 8352/2009, M.F.A. No. 3581/2009 assisted with Misc. Cvl. No. 8851/2009, M.F.A. No. 3585/2009 assisted with Misc. Cvl. No. 8841/2009, M.F.A. No. 3589/2009 assisted with Misc. Cvl. No. 8826/2009 and M.F.A. No. 3591/2009 assisted with Misc. Cvl. No. 8836/2009, Sri. Mahesh R. Uppin, in M.F.A. No. 2274/2009, M.F.A. No. 2276/2009, M.F.A. No. 2275/2009, M.F.A. No. 2273/2009 and M.F.A. No. 2277/2009, for the Appellant; Mahesh R. Uppin, for R1 in M.F.A. No. 3578/2009 A/W Misc. Cvl. No. 8352/2009, M.F.A. No. 3581/2009 A/W Misc. Cvl. No. 8851/2009, M.F.A. No. 3585/2009 A/W Misc. Cvl. No. 8841/2009, M.F.A. No. 3589/2009 A/W Misc. Cvl. No. 8826/2009 and M.F.A. No. 3591/2009 A/W Misc. Cvl. No. 8836/2009, Sri. A.N. Krishna Swamy, for R 2 R 1-served in M.F.A. No. 2274/2009, M.F.A. No. 2276/2009, M.F.A. No. 2275/2009, M.F.A. No. 2273/2009 and M.F.A. No. 2277/2009, for the Respondent

Final Decision : Allowed

Judgement

S.N. Satyanarayana

1. These 10 appeals are arising out of common order dated 26.2.2009 passed in

CR. Nos. 41, 42, 43, 44 and 45/2008 on the file of Commissioner for Workmen's Compensation, Davanagere. The appeals in MFA. Nos. 3378, 3581, 3585, 3589 and 3591/09 are filed by the common 2nd respondent insurance company in CR. Nos. 41 to 45/2008 respectively. These appeals are filed by 2nd respondent challenging the quantum of compensation awarded by Commissioner in the aforesaid claim petitions. Whereas claimants in said claim petitions have also filed appeals seeking enhancement of compensation which are respectively, MFA. Nos. 2274, 2276, 2275, 2273 and 2277/09. All these 10 appeals are taken up together for disposal in the presence of counsel for claimants and as well as 2nd respondent insurance company. For the sake of convenience the parties to these appeals are referred to by their rank before the Commissioner.

2. Brief facts leading to these appeals are Claimants in the said petitions contend that they were working as coolies in lorry bearing No. KA-14/A-0375 belonging to common 1st respondent in all the claim petitions and insured with common 2nd respondent insurance company in all claim petitions. Their case is that on 4.1.2008 all of them were traveling in the said lorry along with the load of paddy in the course of their employment. The said lorry met with an accident near Nandigavi village due to rash and negligent driving resulting in injuries to claimants. Hence, they filed claim petitions seeking compensation for the injuries suffered in the aforesaid accident.

3. In the said proceedings, considering the pleadings, oral and documentary evidence available on record the Commissioner allowed the claim petitions holding that there exist relationship of employee and employer between claimants and 1st respondent who is owner of lorry which is insured with 2nd respondent. It was further held that accident resulting in injuries to claimants has taken place in the course of their employment under 1st respondent and the injuries suffered by them are directly attributable to their employment with 1st respondent in the said lorry. The Commissioner by accepting relationship between parties as above proceeded to award compensation to each one of the claimants relying upon the evidence of Dr. Nagabhushan, PW 6, who treated the claimants in the aforesaid proceedings.

4. PW. 6, an Orthopaedic surgeon of Navodaya Hospital, Davanagere has stated that he has treated the claimants. He has also issued disability certificate to them as per Exs. P9, 12, 18, 25 and 31. According to him, said disability certificate is issued after personally treating the claimants and after examining the injuries suffered by them and based on the wound certificates which are issued immediately after the accident has taken place vide Exs. P6, 14, 22, 28 and 35. In addition to that he also relied upon the x-rays of claimants which are at Exs. P 10, 13, 19, 26 and 32, accordingly assessed loss of earning capacity of claimants as under:

(a) In CR. 41/ claimant has suffered fracture of right fibula, right posterior malleolus. According to PW. 6, claimant has suffered limb disability to an extent of 40 %. Based on that the Commissioner has assessed his loss of earning

capacity at 35 %.

(b) In CR. No. 42/2008 claimant is said to have suffered fracture of right scapula and 8th and 9th ribs. According to PW. 6, claimant has suffered limb disability to an extent at 35 %. Based on that the Commissioner has assessed his loss of earning capacity at 30 %.

(c) In CR. No. 43/2008 claimant is said to have suffered fracture of left radius and segmental fracture of left ulna. According to PW. 6, claimant has suffered limb disability at 40 %. Based on that the Commissioner has assessed his loss of earning capacity at 35 %.

(d) In CR. No. 44/2008 claimant is said to have suffered fracture of left clavicle and left scapula. According to PW. 6, claimant has suffered limb disability to an extent of 35 %. Based on that the Commissioner has taken his loss of earning capacity at 30 %.

(e) In CR. No. 45/2008 claimant is said to have suffered fracture of left tibia. According to PW 6, claimant has suffered limb disability to an extent of 25 % Based on that Commissioner has taken his loss of earning capacity at 20 %.

5. In all the five claim petitions the Commissioner has taken the wages of claimants unilaterally at Rs. 3,000/- pm., and by applying relevant factors in each case according to the age of claimants has awarded compensation as under:

- 1) In CR. No. 41/2008 a sum of Rs. 1,22,623/-
- 2) In CR. No. 42/2008 a sum of Rs. 1,15,328/-
- 3) In CR. No. 43/2008 a sum of Rs. 1,25,622/-
- 4) In CR. No. 44/2008 a sum of Rs. 1,15,328/-
- 5) In CR. No. 45/2008 a sum of Rs. 76,244/-

6. The 2nd respondent insurance company being aggrieved by the said common order has come up in one batch of appeals challenging the quantum of compensation. However, another batch of appeals is filed by claimants stating that there is error on the part of Commissioner in taking the wage quotient of claimants at Rs. 3,000/- pm., which is on lower side and sought for enhanced compensation to be reassessed taking higher wages.

7. On going through the grounds of appeals in both sets of appeals and the finding of Commissioner in the common impugned order, this Court find the following substantial questions of law arise for consideration in these appeals:

1) Whether the Commissioner was justified in taking the loss of earning capacity of claimants without there being an acceptable evidence on the part of Doctor as contemplated u/s 4 (1) (c) (ii) of the Workmen's Compensation Act ?

2) Whether the Commissioner was justified in taking the wages of claimants at

Rs. 3,000/- contrary to the decision of this court and Apex Court with reference to the wages payable to a cleaner in the lorry during the year 2008?

Heard the counsel for appellants and respondents in both batches of appeals. On re appreciation of the pleadings oral and documentary evidence available on record with reference to grounds of appeals and finding of Commissioner in the common impugned order this Court answer the aforesaid substantial questions of law in the negative for the following:

REASONS

8. In this proceedings the relationship of employer and employee between claimants and 1st respondent is not in dispute. It is further not in dispute that 1st respondent in all the claim petitions is the owner of lorry bearing No. KA-14/A-0375 and said lorry is insured with 2nd respondent and there is relationship of insured and insurer between 1st and 2nd respondents. It is also not in dispute that aforesaid lorry belonging to 1st respondent insured with 2nd respondent met with an accident on 4.1.2008 and the said accident has taken place in the course of employment of claimants in the lorry belonging to 1st respondent insured with 2nd respondent. It is further not in dispute that injuries suffered by claimants are directly attributable to the accident which has taken place in the course of their employment under 1st respondent.

9. Now coming to 1st substantial question of law the evidence of Doctor PW. 6 who is common expert witness to all claimants, he has relied upon the wound certificate and as well as disability certificate issued by him to adduce evidence to state the extent of disability that each of the claimants have suffered for the injuries suffered by them in the aforesaid accident. The evidence of PW. 6 is with reference to limb disability the claimants have suffered in each of the claim petitions. He does not say what could be the whole body disability that the claimants have suffered with reference to limb disability stated in his evidence. He also does not give his opinion regarding functional disability the claimants have suffered because of the said injuries resulting in loss of earning capacity to them with reference to their job as it is required to be furnished with reference to Section 4 (1) (c) (ii) of the Act. The Act clearly states that without there being an acceptable opinion on behalf of doctor it is not permissible for the Commissioner to assess the loss of earning capacity arbitrarily by looking in to the evidence by himself. In the instant cases the Commissioner has done exactly that, he has not appreciated the documents available on record with reference to loss of earning capacity each of the claimants have suffered due to limb disability caused to them in the aforesaid accident. In the absence of acceptable evidence and without there being proper reasons assigned by Commissioner for taking the limb disability as the loss of earning capacity this Court is required to reassess the same with available evidence on record.

(a) In CR. No. 41/2008 with reference to fracture of right fibula and right posterior malleolus the doctor does not say that whether the fracture is united

properly. It is also not stated whether there is mal union of bone resulting in the claimant not being able to carryout the work of coolie as he was doing earlier. The doctor while stating that claimant has 40 % limb disability has not given his opinion as to what will be the whole body disability and loss of earning capacity to claimant with reference to his avocation. Therefore, there is error on the part of Commissioner in taking 5 % less of the limb disability which is at 40 % as loss of earning capacity. If limb disability is 40 %, normally whole body disability would come to roughly around 20 %. In the instant case the Commissioner should have taken 20 % as loss of earning capacity and should have assessed the compensation payable to claimant accordingly.

(b) In CR. No. 42/2008 the same method is adopted by Commissioner where the Doctor has stated the limb disability is 35 %. 5 % less is taken as loss of earning capacity. Considering the nature of injuries this Court is of the opinion that right percentage of loss of earning capacity that the claimant would suffer would be 10 %.

(c) Coming to CR. No. 43/2008, considering the fracture of left radius and segmental fracture of left ulna the limb disability being 40 % the Commissioner has taken loss of earning capacity at 35 %. In view of the serious nature of the injury, 50 % of the limb disability should be taken as loss of earning capacity which works out to 20 %. Therefore, the compensation is required to be calculated taking the loss of earning capacity of claimant at 20 %.

(d) So also in CR. No. 44/2008, the claimant has suffered fracture of left clavicle and fracture of left scapula, for which the doctor has given his opinion that there is limb disability of 35 %. The Commissioner has taken it as 30 % towards loss of earning capacity. As discussed above in this case also the loss of earning capacity will have to be taken at 50 % of limb disability i.e., 50 % of the loss of earning capacity taken by Commissioner, accordingly the compensation is required to be calculated taking loss of earning capacity at 15 %.

(e) Coming to CR No. 45/2008 for the fracture of left tibia the doctor has given his opinion that there is limb disability of 25 %, for which the Commissioner has taken at 20 % towards loss of earning capacity. Considering the fact that it is fracture of tibia this court holds that keeping in mind the same analogy as it was done in earlier cases, the claimant would be entitled to compensation calculated on the basis of 15 %.

With the aforesaid discussion this Court hold that compensation payable to each one of the claimants will have to be calculated taking in to account the loss of earning capacity as arrived at above by this Court.

10. But before calculating the compensation this Court will have also have to consider whether the wage quotient taken by Commissioner with regard to claimants is just and proper. Admittedly, the accident resulting in injuries to claimants 1 to 5 has taken place in the year 2008. At relevant time the claimants were working in Davanagere Town. Around that time with reference to wages

payable to coolies this Court in catena of cases has taken that appropriate wage quotient that should be taken in to consideration is Rs. 3,500/- pm. In the instant cases also if the wages of all claimants are unilaterally taken at Rs. 3,500/- pm., the compensation payable to each of the claimants in the aforesaid five claim petitions will be as under:

(a) CR. No. 41/2008

Rs. $3500 \times 60 \% = 2100 \times 20 \% \times 194.64 = 81,748/-$ as against Rs. 1,22,623/- awarded by Commissioner.

(b) CR. No. 42/2008

Rs. $3500 \times 60 \% = 2100 \times 10 \% \times 213.57 = 44,850/-$ as against Rs. 1,15,328/- awarded by the Commissioner.

(c) CR. No. 43/2008

Rs. $3500 \times 60 \% = 2100 \times 20 \% \times 199.40 = 83,748/-$ as against

Rs. 1,25,622/- awarded by Commissioner.

(d) CR. No. 44/2008

Rs. $3500 \times 60 \% = 2100 \times 15 \% \times 213.57 = 67,275/-$ as against Rs. 1,15,328/- awarded by the Commissioner.

(e) CR. No. 45/2008

Rs. $3500 \times 60 \% = 2100 \times 15 \% \times 211.79 = 66,714/-$ as against

Rs. 76,244/- awarded by the Commissioner.

11. In the light of the above discussion the compensation payable to each one of the claimants is reassessed as above which they are entitled to receive with interest at 12 % p.a., from 30th day of order till date of deposit of entire amount.

12. Accordingly, the appeals filed by claimants as well as insurance company are allowed in part in the aforesaid terms. The common order dated 26.2.2009 in CR Nos. 41 to 45/2008 is modified. From out of the amount in deposit the modified compensation is required to be released in favour of claimants as under:

In each of the claim petitions, the registry is directed to deposit 80% of the compensation awarded in favour of claimant in any nationalized bank initially for a period of five years and the remaining balance of 20 % along with interest shall be released in favour of claimant. The excess amount in deposit be refunded to the appellant insurance company in each of the appeals.

In view of the appeals being allowed in part, the Misc. (Ms., seeking stay of the impugned order does not survive for consideration.