
(2013) 03 AHC CK 0072
In the Allahabad High Court
Case No : F.A.F.O. No's. 457 and 458 of 2013

H.D.F.C. Ergo General Insurance Co. Ltd.	APPELLANT
Vs	
Virendra Gond and Another	RESPONDENT

Date of Decision : 07-03-2013

Acts Referred:

Workmens Compensation Act, 1923 — Section 4A(3)

Citation : (2013) 3 ALJ 612 : (2013) 138 FLR 788 : (2013) 4 LLN 480 : (2013) LLR 1098

Hon'ble Judges : Rakesh Tiwari, J;Anil Kumar Sharma, J

Bench : Division Bench

Advocate : S.K. Mehrotra, for the Appellant; V.C. Dixit, for the Respondent

Judgement

Anil Kumar Sharma, J.—Both these appeals arise out of the same accident, so with the consent of the parties they have been heard together and are being finally decided at the stage of admission by this judgment. It appears that in the separate claim petitions filed before the Workmen's Compensation Commissioner, the respondent No. 1 in both the appeals claimed themselves to be co-driver/khalasi and driver respectively on Tata truck No. DN 09G/9645 owned by respondent No. 2 on monthly salary was Rs. 4,500/- and 6,500/- respectively apart from diet.

2. It appears that in an accident dated 17.9.2009 the aforesaid vehicle collided with a tree by the side of the road and overturned whereby the respondents suffered grievous injuries during their employment and another workman Bajrangi suffered death. Respondent No. 1 in each of the appeal claimed that due to the injuries sustained he has become permanently disabled and suffered 100% loss in their respective earning capacity. Their disability certificate mentioned that respondent Virendra Gaur had suffered 60% and Dinesh Kumar Yadav sustained 65% permanent disablement. Dr. A.K. Srivastava, Orthopaedic Surgeon of District Hospital, Azamgarh was examined in each case who testified that on account of grievous injuries sustained by the injured they have lost their

100% earning capacity. The owner of the vehicle did not chose to contest the claim petition, while appellant filed its written statement in both the cases inter alia alleging collusion between the claimants and owner of the vehicle and also disputed their salary and permanent disablement as also 100% loss in their earning capacity. The claimants led oral and documentary evidence, while the appellant did not adduce any evidence. The Workmen Compensation Commissioner, Azamgarh through impugned award without any evidence on the income of the claimants computed their pay @ Rs. 4,000/- per month and on the basis of medical evidence of Dr. Srivastava and disability certificate of each claimant held 100% loss in their earning capacity. As per age of respondent No. 1 in each case compensation of Rs. 5,20,584/- and 5,15,572/- together with simple interest @ 12% per annum from the date of accident till final payment was awarded directing the appellant to indemnify the award as the vehicle was insured with them and there was no breach of conditions of insurance policy. Aggrieved, the appellant has preferred these appeals before this Court.

3. We have heard the learned counsel for the appellant and learned counsel for respondent No. 1 on merits with their consent. The owner of vehicle in question (Respondent No. 2) did not chose to appear before the Workmen's Compensation Commissioner even after sufficient service and the cases proceeded ex parte against him.

4. The appellant has challenged the award dated 4.12.2012 passed by Workmen's Compensation Commissioner/Deputy Labour Commissioner, Azamgarh in W.C.A. No. 105/2011-Dinesh Kumar Yadav v. Krishna Knit Wear Technology Ltd., Silwasa (Gujarat) and another (FAFO no. 457/2013) and 106/2011-Virendra Gaur v. Krishna Knit Wear Technology Ltd., Silwasa (Gujarat) and another (FAFO No. 458/2013), whereby the claim application of claimant-respondent No. 1 was allowed and compensation of Rs. 5,20,584/- and 5,16,672/- respectively have been awarded.

5. Learned counsel for the appellant has argued the following points before us in support of the appeals:

(i) that claimant-respondent No. 1 in both the appeals have failed to establish their employment as driver, co-driver/khalasi on the vehicle in question and their monthly pay of Rs. 4,000/-;

(ii) that Workmen's Compensation Commissioner has erred in assuming 100% loss of earning capacity of claimant while assessing the amount of compensation as against 60% and 65% disability mentioned in their respective disability certificates;

(iii) that Workmen's Compensation Commissioner has committed illegality in awarding compensation together with interest @ 12% per annum from the date of accident, which is contrary to the provisions of Section 4-A(3) of Workmen's Compensation Act, 1923.

Per contra learned counsel for the respondent-claimant refuting the above arguments has submitted that from the uncontroverted evidence adduced by the claimants it is proved that they were employed as driver (Dinesh Kumar Yadav) and khalasi/co-driver (Virendra Gaur) on Tata Truck No. DN 09G/9645 on Rs. 6500/- and 4500/- per month salary respectively apart from diet charges. They suffered grievous injuries in an accident caused during the course of their employment; that on account of injuries suffered in the accident the claimants have lost their earning capacity, so the Workmen's Compensation Commissioner has not erred in assessing 100% loss in the earning capacity of each claimants. It has further been submitted that the interest has been rightly awarded from the date of accident as per provisions of Section 4-A(3) of Workmen's Compensation Act, 1923, hence the appeals are liable to be dismissed.

6. The Workmen's Compensation Commissioner in the absence of any cogent and reliable evidence about the monthly pay of claimants did not believe the pay alleged by each of them and has taken their pay @ Rs. 4,000/- per month, although the appellant could not controvert the statement given by the claimants in this regard. The accident in question had taken place on 17.9.2009, therefore, considering the prevailing economic conditions and price inflation, we do not find any illegality in the adjudication of monthly pay of the claimants as it is proved that they were employed as driver/co-driver on the vehicle involved in the accident and owned by respondent No. 2. Thus, the 1st contention raised by the learned counsel for the appellant is repelled.

7. Learned counsel for the appellant has vehemently argued that in the both the case, the claimant's have filed their disability certificate issued by the Chief Medical Officer, wherein the permanent disability of respondent No. 1 has been noted as 60% and 65% respectively, but the learned Workmen's Compensation Commissioner has erroneously held 100% loss in their earning capacity. He further contended that in the disability certificate only functional disability to a particular limb had been mentioned and it has No co-relation with loss in their earning capacity. Per contra learned counsel for the respondent no. 1 has contended that the claimants have not only filed their disability certificate issued by the competent authority, but they have examined the Orthopedic Surgeon of District Hospital, Azamgarh to substantiate the plea of 100% loss in their earning capacity.

8. The Workmen's Compensation Commissioner in support of its findings about loss of 100% earning capacity of each claimant has placed reliance on the following case-laws:

(i) 2001(2) TAC 72 (AP) Rampati Venketander Rao v. Mantai Sambhashiv Rao and another;

(ii) 2001(1) (Vernacular matter omitted...Ed) 146, Oriental Insurance Co. Ltd. v. Koti-Koti Reddy and another;

(iii) 2000(2) TAC 381, Allahabad National Insurance Co. Ltd. v. Krishna Mehta

and another;

(iv) Oriental Insurance Co. Ltd. Vs. Shambhu Nath Yadav and Another, ;

(v) 2004 (3) TAC 121: (2004 All LJ 1877) (Allahabad) New India Insurance Co. Ltd. v. Samiullah and another;

(vi) Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, .

Learned counsel for the appellant in support of his contention has placed reliance on the following cases--

(a) Oriental Insurance Co. Ltd. Vs. Mohd. Nasir and Another, ;

(b) Palraj Vs. The Divisional Controller, NEKRTC, , and

(c) Raj Kumar Vs. Ajay Kumar and Another, .

On the other hand learned counsel for respondent No. 1 in both the appeal has relied upon the cases of Oriental Insurance Co. Ltd. Vs. Shambhu Nath Yadav and Another, (relied upon by the Workmen's Compensation Commissioner) and Raj Kumar (supra). We have carefully gone through all the aforesaid reports. We may refer to the case of Raj Kumar (supra), wherein the Apex Court has observed as under:

7. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%.

8. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is

45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in Arvind Kumar Mishra Vs. New India Assurance Co. Ltd. and Another, and Yadava Kumar Vs. The Divisional Manager, National Insurance Co. Ltd. and Another, .

In this case the Hon''ble Court has given guidelines for assessment of permanent disability and calculating compensation there for, the relevant para is as under:

13. We may now summarize the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability)

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

Thus, loss of earning capacity of the claimant''s on account of grievous injuries sustained by each of them in the accident have to be ascertained in view of the aforesaid principles of law enunciated by the Apex Court.

9. The Workmen''s Compensation Commissioner with regard to his assessment of 100% loss of earning capacity of Virendra Gaur has observed as under:

(Vernacular matter omitted.... Ed)

With regard to claimant Dinesh Kumar Yadav in FAFO on 458 of 2013, the Workmen's Compensation Commissioner, has held thus:

(Vernacular matter omitted.... Ed)

The appellant has not adduced any contra evidence with regard to permanent disability or 100% loss in their earning capacity before the Workmen's Compensation Commissioner.

10. We are conscious of the fact that concept of functional disablement is quite distinct with loss in earning capacity of an individual who suffers injury in an accident. They are not the same. The claimant in each case had led overwhelming evidence to prove that on account of injuries suffered by each of them they are totally incapacitated to engage themselves in any vocation which they were pursuing prior to the accident. On perusal of the medical evidence led by the claimants in their respective cases and above findings, we find that they substantially comply with the observations of the Apex Court given in the case of Raj Kumar (supra). The case-laws referred by the parties before the Workmen's Compensation Commissioner have been discussed in the impugned award and reasonable and correct conclusion has been drawn. Thus, no illegality has been committed by the Workmen's Compensation Commissioner in holding 100% loss in earning capacity of each claimant-respondent.

11. As regards the controversy regarding date of payment of interest in an award under Workmen's Compensation Act, the learned counsel for the appellant has relied upon the following cases to contend that the learned Workmen's Compensation Commission has erroneously fastened the liability on the appellant to pay interest @ 12 per annum from the date of accident, while it should have been from the date it "fell due", i.e. date of the award:

(I) Oriental Insurance Co. Ltd. Vs. Mohd. Nasir and Another, ;

(II) National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another, ;

(III) Palraj Vs. The Divisional Controller, NEKRTC, .

In all these cases the Apex Court has held that interest would be from date of default and not from the award. In National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another, it was held that the crucial expression being "falls due" so unless the claim of the concerned workmen is adjudicated, question of an amount falling due does not arise. In Pal Raj's case: (AIR 2010 SCW 6996) (supra) it was observed that "compensation u/S. 4 of Workmen's Compensation Act is to be paid as soon as it falls due and in case of default in payment of the compensation due under the Act within one month from the date when it falls due, the Commissioner would be entitled to direct payment of simple interest on the amount of arrears @ 12 per annum or at such higher rates which do not exceed the maximum lending rates of any scheduled Bank as may be specified by the Central Government." All these cases have been decided by a division bench of Apex Court consisting of two Hon'ble Judges.

12. On the other hand learned counsel for the respondent No. 1 has placed reliance on the following cases to support his contention that the interest under the award is to be paid to claimants from the date of accident and not from the date of award:

(A) Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, ;

(B) The Oriental Insurance Company Ltd. Vs. Siby George and Others, .

On perusal of the case-laws referred to by the learned counsel for the appellant we venture to submit with respect that the case of Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, , which was decided by the Bench consisting of 4-Hon''ble Judges of the Apex Court was not brought to the notice to the Hon''ble Court, wherein the Hon''ble Supreme Court in para-7 has observed as under:

Section 3 of the Act deals with the employer's liability for compensation. Subsection (1) of that section provides that the employer shall be liable to pay compensation if personal injury is caused to a workman by accident arising out and in the course of his employment. It was not the case of the employer that the right to compensation was taken away under sub-section (5) of Section 3 because of a suit in a civil court for damages, in respect of the injury against the employer or any other person. The employer therefore became liable to pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of an in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the Commissioner's order dated May 6, 1969 u/s 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation u/s 3, in respect of the injury, was suspended until after the settlement contemplated by Section 19. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the arguments to the contrary.

Following the principles of law laid down in the aforesaid case, the Hon''ble Court in the case of The Oriental Insurance Company Ltd. Vs. Siby George and Others, in paras-11 and 12 has observed as under:

11. The decisions in Pratap Narain Singh Deo was by a four Judges Bench and in Valsala by a three Judges Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But, the earlier decisions in Pratap Narain Singh Deo and Valsala were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir.

12. In light of the decisions in Pratap Narain Singh Deo and Valsala, it is not open

to contend that the payment of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made. The decisions in Mubasir Ahmed and Mohd. Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala do not express the correct view and do not make binding precedents.

The case of Kerala State Electricity Board and Another Vs. Valsala K and Another, came before the Court after amendments were introduced in the Act by Act No. 30 of 1995 and a Bench of Apex Court consisting 3 Hon'ble Judges followed the ratio given in Pratap Narain Singh Deo (supra). We, therefore, find that the case-law referred by the learned counsel for the appellant stood specifically overruled by the Apex Court in the aforesaid case, so it has no binding effect. Thus, the learned Workmen's Compensation Commissioner has not at all erred in awarding interest @ 12% per annum to the respective claimant from the date of accident.

13. The appellant as an insurance company engaged in the insurance business owe some social responsibility as well. The appellant are well equipped with battery of legal personnel and efficient lawyers in their armory should think twice before coming to Courts raising the points of law which are no more res integra and are well settled by the highest Court of country. If the poor workman suffering 100% loss in his earning capacity is not paid the amount of legally admissible compensation and is unnecessarily dragged to defend the award in an appeal in this Court running across the large State incurring expenses it would certainly add insult to his injury. In the light of the discussion made above, we find that the appeals have no force at all and are accordingly dismissed. The amount deposited by the appellant before the Commissioner be disbursed to the respective claimant.