**(2014) 04 RAJ CK 0136**

**In the Rajasthan High Court**

**Case No :** Civil Misc. Appeal No. 4607/2009

ICICI Lombard General Insurance Co. Ltd. APPELLANT

Vs

Shubhash Vamanrav and Another RESPONDENT

**Date of Decision :** 04-04-2014

**Acts Referred:**

Motor Vehicles Act, 1988 — Section 140, 166
Workmens Compensation Act, 1923 — Section 22, 30

**Citation :** (2014) 4 ACC 368 : (2014) 142 FLR 611 : (2014) 2 LLN 795

**Hon'ble Judges :** Alok Sharma, J

**Bench :** Single Bench

**Advocate :** Virendra Agrawal, Advocate for the Appellant; Sandeep Mathur, for Respondent No. 1, Advocate for the Respondent

**Final Decision :** Allowed

## Judgement

Alok Sharma, J.—This miscellaneous appeal u/s 30 of the Workmen'' Compensation Act, 1923 (hereinafter ''the 1923 Act'') has been filed against the judgment dated 24-7-2009 passed by the Workmen'' Compensation Commissioner, Jaipur District-I, Jaipur (hereinafter ''the Commissioner''). Thereby the Commissioner found the respondent claimant Shubhash Vamanrav (hereinafter ''the claimant'') entitled to compensation for a sum of Rs. 3,74,046/- along with interest at the rate of 12% from the date 20-1-2008 i.e. after thirty days of the date of accident 21-12-2007. This appeal was admitted by this court on 11-9-2009. The substantial questions of law which arise in this appeal are:-

1. Whether the determination of loss of earning capacity of the claimant at 100% on the basis of subsequent permanent disability certificate dated 22-1-2009 (Ex. 7) issued at the Government hospital Bagru showing permanent disability 49.41% overlooking the prior permanent disability certificate dated 14-7-2008 (Ex. C-1) issued by department of Orthopedics Y.N. Hospital Kishangarh showing permanent disability of the claimant at 14%, was justifiable and sustainable in law?

2. Whether the subsequent permanent disability certificate could at all be taken into consideration for assessment of loss of earning capacity in the absence of testimony of the doctor who issued the said certificate?

3. Whether in view of the fact that the claimant had also filed a claim petition (155/2008) for compensation before the Motor Accident Claims Tribunal Kishangarh (hereinafter ''the Tribunal'') on 19-5-2008, and availed of an interim award u/s 140 of the Motor Vehicles Act, 1988, the claim petition filed before the Commissioner on 3-1-2008 was vitiated and deserving of dismissal without anything more?

2. The facts of the case are that the claimant filed a claim petition No. 23/2008 before the Commissioner on 3-1-2008 u/s 22 of the 1923 Act. It was alleged that he suffered injuries in an accident of 21-12-2007 when he was working as Khalasi on container No. HR-38/G-2782, which was insured with the appellant ICICI Lombard General Insurance Company Ltd. The claimant gave out his age to be 35 years at the time of accident and wages to be Rs. 6500/- per month while working as Khalasi on the said container.

3. In spite of service of notice on the claim petition the owner of the offending vehicle owned by the insured M/s. Varuna Road Lines Pvt. Ltd. did not appear before the Commissioner and ex-parte proceedings were taken against it on 6-8-2008.

4. The Insurance company however filed reply to the claim petition. It was specifically stated in the reply that there was no credible proof of employee and employer relationship between the claimant and the owner of the offending vehicle--the container insured with the appellant company. It was also brought to the notice of the Commissioner, through an application dated 6-3-2009 that while proceedings were pending before him with regard to the same accident of the container in question on 21-12-2007 the claimant had in fact also taken proceedings before the Motor Accident Claims Tribunal Kishangarh on 15-5-2008 by filing claim petition No. 155/2008 u/s 166 of the Motor Vehicles Act, 1988. Along with the application duly supported by an affidavit the certified copy of the claim petition No. 155/2008 was also filed before the Commissioner. In the meantime the claimant was granted interim award of Rs. 25,000/- vide Tribunal''s order dated 18-11-2008 and the said amount was withdrawn by the claimant on 23-1-2009 even while his claim before the Commissioner was being pursued.

5. The said application dated 6-3-2009 filed by the appellant insurance company was however dismissed by the Commissioner on 13-4-2009 stating that as the claim petition filed before the MACT Kishangarh was subsequent, the same had no effect on the claim petition u/s 22 of the 1923 Act before him. Oddly on the same day the evidence of the claimant was recorded in haste by the Commissioner.

6. Be that as it may, the proceedings continued before the Commissioner, Mr.

 

Dharampal, who with impunity also overlooked the facts on record in the application filed by the insurance company that the claimant before the Tribunal Kishangarh had stated his wages to be Rs. 3400/- per month, while before the Commissioner his wages had been stated to be Rs. 6500/- per month. The Commissioner plainly misusing his jurisdiction acted arbitrarily, reckoned the income of the claimant at Rs. 4000/- per month at the time of accident on 21-12-2007 and thereon computed the amount of compensation relying on the subsequent permanent disability certificate dated 22-1-2009 (Ex. 7) issued at the Government hospital Bagru showing disability at 49.41% and shockingly holding that the claimant had suffered 100% earning capacity. Compensation of Rs. 3,99,046/- was awarded. Mercifully it was directed that the amount of Rs. 25,000/- paid to the claimant as an interim award by the Tribunal Kishangarh would be adjusted in the compensation determined.

7. Heard learned counsel for the parties and perused the impugned award dated 24-7-2009 passed by the Commissioner.

8. Learned counsel for the appellant insurance company has submitted that it is apparent that the claimant had fraudulently obtained the permanent disability ability certificate dated 22-1-2009 (Ex. 7) from the Government hospital Bagru showing permanent disability 49.41% and suppressed the prior permanent disability certificate dated 14-7 2008 (Ex. C-1) issued by the medical board of the Y.N. Hospital Kishangarh showing permanent disability of the claimant as 14%. This prior permanent disability certificate dated 14-7-2008 is taken by this court on record and marked as Exhibit C-1. Learned counsel for the appellant insurance company has further submitted that the award dated 24-7-2009 passed by the Commissioner is liable to be set aside because of the misrepresentation of the claimant, fraud played by him and the consequent misuse of the judicial process as even while in the claim petition before the MACT Kishangarh the claimant disclosed his wages to be Rs. 3400/- per month, age at 44 years and had suffered permanent disability of 14% in terms of the certificate dated 14-7-2008 issued at the Medical Board, Kishangarh hospital before the Commissioner he claimed his wages to be Rs. 6500/- per month, age to be 34 years at the time of the accident and permanent disability 49.41% in terms of the fraudulently procured certificate dated 22-1-2009. Counsel submitted that in spite of the fact that the claimant had availed interim award of Rs. 25,000/- u/s 140 of the 1988 Act before the Tribunal Kishangarh, yet this fact was oddly found insufficient by the Commissioner to dismiss the claim petition filed by the claimant solely before him on ground of fraud and availing of two remedies. Counsel then submitted that even otherwise the permanent disability certificate dated 22-1-2009 (Ex. 7) issued at the Government hospital Bagru showing permanent disability of the claimant at 49.41% was of no avail as the said certificate was inadmissible in evidence without the doctor who issued it being examined before the Commissioner. Counsel also submitted that loss of earning capacity could not be based on ipse dixit of the Commissioner, inasmuch as under the 1923 Act, it is for an expert to be examined for the purpose of

 

determining the loss of earning capacity. Reference has been made to the judgment of this court in the case of National Insurance Company Vs. Jitendra Kumar, S.B. Civil Miscellaneous Appeal No. 2473/2004 decided on 21-1-2014. Reliance has also been placed on the judgment in the case of United India Insurance Co. Ltd. Vs. Rajendra Singh and Others, wherein it has been held that every court or Tribunal has the power to review its own order it is convinced that the order was wrangled from it through fraud or misrepresentation of such a dimension as would affect the very basis of the claim and if not recalled would lead to serious miscarriage of justice. Counsel submitted that in the facts obtaining the impugned award dated 24-7-2009 passed by the Commissioner is wholly arbitrary, unjust, based on fraud by the claimant and therefore the same is liable to be quashed and set aside.

9. Mr. Sandeep Mathur, learned counsel for the claimant has submitted that availing of two remedies by the claimant is of no consequence, inasmuch as the claimant had abandoned the proceedings before the Tribunal Kishangarh and so far as the amount of interim award of Rs. 25,000/- availed by the claimant u/s 140 of the 1988 Act before the Tribunal Kishangarh is concerned, it has been adjusted in the amount awarded by the Commissioner. He submitted that the provisions of 1923 Act are a socio beneficial legislation and dismissal of claim petition in toto only because of availing two remedies is not warranted in law. It was submitted that the Commissioner has assessed the loss of earning capacity of the claimant on the basis of permanent disability certificate dated 22-1-2009 (Ex. 7) issued at the Government hospital Bagru showing disability 49.41% as filed before the Commissioner. He then exercised his discretion and judgment in evaluating the impact of permanent disability on the regular job of the claimant working as a Khalasi at the time of the accident at 100% loss of income.

10. Having heard learned counsel for the parties and perused the impugned award dated 24-7-2009 passed by the Commissioner. From facts obtaining on record it appears that the impugned award passed by the Commissioner is vitiated by fraud, inasmuch as even while in the claim petition before the Tribunal Kishangarh the claimant has stated his age to be 44 years and income to be Rs. 3400/- per month, in the claim petition before the Commissioner he claimed his income to be Rs. 6500/- per month and age to be 35 years. In such circumstances, in my considered opinion there was no occasion for the Commissioner to evaluate the claimant''s wages to be Rs. 4000/- per month i.e. higher than Rs. 3400/- per month as claimed before the Tribunal Kishangarh. The claimant is evidently untrustworthy and indulgent in plain unabashed perjury and his evidence cannot be relied upon.

11. Aside of aforesaid, the medical board constituted of the department of Orthopedics Y.N. Hospital Kishangarh had found permanent disability of the claimant only at 14% and issued its certificate dated 14-7-2008. This fact was suppressed by the claimant from the Commissioner by placing on record the fraudulently procured permanent disability certificate dated 22-1-2009 (Ex. 7)

 

issued at the Government hospital Bagru showing permanent disability at 49.41%. The fraud in dual claim petitions was brought to the notice of the commissioner but he oddly proceeded to overlook the conduct of the claimant and even the contrary facts pleaded by the claimant as to his age and income before the MACT Kishangarh.

12. In the instant case the Commissioner has not taken any expert advice as he should under the Act of 1923 for assessing loss of income of the claimant and did not even require the claimant to have the doctor who issued the medical certificate of disability to him on 22-1-2009 examined by entering the witness box. He overlooked the law that the permanent disability certificate was not admissible unless the issuing doctor was examined and proceeded to assess the claimant''s loss of earning capacity at 100%. The Commissioner''s jurisdiction has been arbitrarily exercised.

13. For the aforesaid reasons, I would therefore answer the substantial questions of law earlier framed in the appeal in favour of the appellant insurance company and hold that the permanent disability certificate dated 22-1-2009 (Ex. 7) issued at the Government hospital Bagru showing disability of the claimant to be 49.41% cannot be taken into consideration, if at all for assessment of loss of income in absence of the testimony of the doctor who issued the certificate. I would consequently hold that there was no evidence of (any probative worth or material otherwise before the Commissioner to determine the loss of earning capacity of the claimant to be 100%. Loss of earning capacity has to be based on expert evidence as held in the case of National Insurance Company Vs. Jitendra Kumar, S.B. Civil Miscellaneous Appeal No. 2473/2004, decided on 21-1-2014.

14. The Hon''ble Supreme Court in the case of United India Insurance Co. Ltd. Vs. Rajendra Singh (supra) has held that where an award is based on fraud, such an award would liable to be set aside. Consequently, I would set aside the impugned award dated 24-7-2009 passed by the Commissioner and remand the matter for reconsideration afresh to a Commissioner other than Mr. Dharampal Singh who passed the impugned award dated 24-7-2009 for reasons best know to him. While considering the claim petition consequent to this remand, the Commissioner is directed to take into consideration the permanent disability certificate dated 14-7-2008 (Ex. C-1) issued by the medical board of the department of Orthopedics Y.N. Hospital Kishangarh showing permanent disability of the claimant as 14% and also to consider the question of fraud by the claimant in obtaining the subsequent permanent disability certificate dated 22-1-2009 from the Government Hospital Bagru, the contradictory stand of the claimant (for certificate of the Medical Board Kishangarh hospital one of them), as also with regard to his age as well as income be taken into consideration too. The Commissioner shall also be required to examine the doctors who issued the permanent disability certificates dated 14-7-2008 and dated 22-1-2009 to the claimant.

15. On consideration of the aforesaid issues amongst others, in the event the

 

Commissioner finds that the claimant had played fraud, the claim petition must be dismissed and appropriate proceedings be taken against the claimant. If the claim is found to be genuine, compensation strictly in accordance with law be redetermined. The miscellaneous appeal stands allowed accordingly.

 