
(2014) 06 BOM CK 0080
In the Bombay High Court
Case No : First Appeal No. 744 of 2003

Ishwar Gulab Pawar

APPELLANT

Vs

Ayoub Jamal (Qureshi)

RESPONDENT

Date of Decision : 24-06-2014

Acts Referred:

Workmens Compensation Act, 1923 — Section 19, 2 (I), 3, 4, 4(1)(c)

Citation : (2015) 3 ACC 865 : (2015) ACJ 1316 : (2014) 6 ALLMR 628 : (2014) 6 BomCR 609 : (2015) 144 FLR 766 : (2015) 1 MhLj 353

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : Rashmi Kulkarni and S.D. Kulkarni, Advocate for the Appellant; V.N. Upadhye, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

T.V. Nalawade, J.—The appeal was admitted on 20.8.2004. Today, by consent, heard the learned counsel for appellant/original claimant and learned counsel for Insurance Company for final disposal. The other learned counsel for respondent No. 2 did not turn up.

2. The appeal is filed by original claimant against the judgment and order of WCA No. 81/1999, which was filed before the Labour Court, Ahmednagar (Commissioner under Workmen's Compensation Act, 1923). The proceeding was filed for compensation in respect of injuries sustained by the claimant in motor vehicle accident and the accident had taken place during the course of his employment with respondent No. 1, owner of the vehicle. The vehicle was insured with respondent No. 2, Insurance Company and the accident took place on 18.3.1999.

3. It is the case of appellant/claimant that he sustained fracture injury to one leg and also to one hand and due to fracture injuries, he cannot work as a driver. He has contended that he had given the evidence accordingly before the

Commissioner, but that evidence is not considered by the Commissioner. It is his case that when his monthly salary was Rs. 2000/- and when there was no evidence in rebuttal to such evidence given by him, the Commissioner presumed that the monthly salary was around Rs. 1300/- and so, the Commissioner has committed error in calculating loss of future income of claimant. It is contended that Commissioner ought to have held that there is permanent total disablement due to these injuries.

4. The other grievance of the appellant/claimant is about the "penalty". It is contended that the Commissioner has not granted penalty even when notice was given by him to the owner and demand of compensation was made and the owner did not pay any compensation. It is contended that the Commissioner ought to have considered the circumstance of giving notice and also the fact that, the claimant is held to be entitled for getting the compensation.

5. During arguments in this proceeding, in view of provision of 30 of Workmen's Compensation Act, 1923 the learned counsels were told that following substantial questions will be considered as per the submissions made by the learned counsel for the appellant and argument was heard on these points.

(i) Whether the Commissioner has committed error in holding that the monthly salary of claimant was only Rs. 1300/-?

(ii) Whether the Commissioner has further committed error in holding that there is only permanent partial disablement and it is to the extent of 40%?

(iii) Whether the Commissioner has committed error in not following the procedure for consideration of grant of the penalty atleast as against respondent No. 1, the employer?

6. From the record, it can be said that the Commissioner considered the relevant evidence and rival cases, but the evidence was not correctly appreciated and the inferences were not correct. It is admitted that the claimant was working as a driver on a tempo, goods vehicle of respondent No. 1. When the accident took place on 18.3.1999, notice of demand was given by the claimant to owner and Insurance Company on 15.7.1999. In the notice, the incident and the claim were mentioned. The injuries were also described, though there was no disability certificate obtained by the claimant at that time. This notice was replied by the owner on 28.7.1999. The owner denied the claim. He denied that the claimant was regular employee and he contended that claimant was appointed as "Badli driver" for two days on daily wages of Rs. 50/- as regular driver was on leave. The owner denied that there was permanent total disablement and the claimant cannot drive the four wheeler due to the injuries sustained in the accident. Though such defence was taken by the owner, in reply, no written statement was filed by owner, employer before the Commissioner. Only the Insurance Company contested the matter. It needs to be kept in mind that the Insurance Company has no personal knowledge with regard to the income and age of the claimant.

7. The claimant examined himself and he examined two doctors to prove the disability. The claimant admitted in the cross examination that the vehicle, which he was driving, was medium weight vehicle. Though he tried to say that he cannot drive heavy vehicle, he has given admission that no tests were taken during his examination to ascertain as to whether he can or he cannot drive four wheeler. He gave evidence that he had come to the Court by using crutches and he was required to use crutches for walking. But only due to this contention, inference is not possible that he cannot walk or he cannot drive four wheeler vehicle. His evidence shows that he had not applied for cancellation of driving licence, he had not surrendered the driving licence. The claimant has admitted that he was not terminated from service and he had not requested to respondent No. 1, employer to give him other job like of cleaner. These things need to be kept in mind while appreciating the evidence given by the two doctors.

8. Dr. Rasool was a member of the team of Amrut Wahini Hospital, where treatment was given to the claimant. He has described the injuries sustained by the claimant and they were as follows:-

- (i) communicated fracture of left tibia,
- (ii) fracture of right tibia with impeding compartment syndrom, and
- (iii) fracture of left radius shaft.

There were other minor injuries like congestion to chest and some part of head. Dr. Rasool is not Orthopedic Surgeon and his evidence can be considered only for proving the injuries sustained by the claimant and for proof of M.L.C.

9. Dr. Shirsat is Orthopedic Surgeon. He gave treatment and he also gave disability certificate. He has given evidence that there was a fracture of left leg. No substantive evidence is given on the fracture of right leg. He has given evidence that there was fracture of left radius. He has given evidence that due to these injuries, the claimant is suffering from permanent disability and it is to the extent of 25%. He has, however, tried to say that claimant cannot drive four wheeler vehicle and so, there is 100% loss of earning capacity. He has given evidence that claimant cannot walk like normal man. The evidence in cross examination of this doctor shows that the disability in respect of limbs was not separately assessed and aforesaid disability is with reference to the entire body. He had not produced the notes of assessment prepared by him for assessing permanent disablement. His evidence shows that he gave disability certificate on the basis of clinical examination only. However, there is other record like discharge card and case papers of the hospital to show that the claimant sustained aforesaid fracture injuries.

10. "Total disability" is defined u/s 2 (I) of the Workmen's Compensation Act, 1923 (In short "Act) as under :-

total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable

of performing at the time of the accident resulting in such disablement:

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more;

11. Section 4 of W.C. Act gives two different modes for calculation of compensation in respect of permanent disablement. The modes show that when there is permanent total disablement, amount equal to 60% of monthly wages multiplied by relevant factor needs to be given. When there is permanent partial disablement, the compensation for total disablement is required to be taken in to consideration and compensation to the extent of percentage of partial disablement only can be given. In the present case, in view of the contentions and the evidence, the provision of section 4(1)(c) needs to be considered and used. The provision is as under:-

(c) Where permanent partial disablement results from the injury -

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which 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 as to exceed the amount which would have been payable if permanent total disablement has resulted from the injuries.

Explanation II.- In assessing the loss of earning capacity for the purpose of sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I;

12. If we see Part I and II of the Schedule I of the Act, it becomes clear that the injuries of claimant do not fall under both these parts. The note below Schedule I is as under:-

Note:- Complete and permanent loss of the use of any limb or member referred to in the Schedule shall be deemed to be the equivalent of the loss of that limb or member.

13. From the aforesaid provisions, it can be said that as total disability assessed was only 25%, and as there is no evidence that in respect of any limb there was

the injury as mentioned in Part I and Part II of Schedule I of the Act, the case needs to be treated as one of permanent partial disablement. There was one option viz. to give evidence as per aforesaid note given to Schedule I. But, no evidence is given by the claimant or doctors to the effect that there is permanent loss of use of any such limb or member referred in the Schedule. So, it is not possible to presume that there is permanent total disablement. Further, the evidence of Dr. Shirsat does not show that he had even referred Schedule I of the Act and in certificate given by Dr. Shirsat also, there is no such mention. It appears that the certificate was prepared for the purpose of Motor Vehicle Act. When there is no loss of limb or member as described in Part I of Schedule I and when there is no evidence to show that there is the loss of use of any limb or member to take the case under Part I of the Schedule, the claimant cannot get compensation under the Act for loss of permanent total disablement. It is not the case that total extent of permanent disability in relation to the limbs injured is 100%.

14. The medical evidence is opinion evidence and even in an inquiry, which is required to be made in summary manner by Commissioner, in such a case, when there is no satisfactory evidence on the loss of earning capacity, the Court (Commissioner) is required to draw inference on whatever material available. The decision of Commissioner on such point is decision on question of fact. The Commissioner has considered the aforesaid material and has come to the conclusion that inference is possible that there is loss of earning capacity to the extent of 40% though permanent partial disablement is to the extent of 25%. This Court sees no reason to interfere in this finding of the Commissioner.

15. The evidence is given on the age of the claimant. He had contended that his age was 29 years at the relevant time. School leaving certificate is produced to show that he was born on 5.6.1969. The accident took place on 18.3.1999. Thus, there was evidence to show that he had completed 29 years on the day of accident. In view of this, apparently proper factor from Schedule IV, given to section 4 of the Act, would be 209.92. The Commissioner has used the factor for age 30, which is 207.98. Thus, there is apparent mistake committed by the Commissioner in adopting proper factor.

16. Rule 27 of Workmen's Compensation Rules, 1924 shows that when proceeding is contested by filing written statement, the Commissioner is not expected to examine the opponent upon the claim. However, when the proceeding is not contested, the Commissioner is expected to proceed to examine the opposite party upon the claim and the provision show that he shall reduce the result of examination in to writing. Though the reply was given to the notice of claimant by the employer, the employer did not file written statement. Insurance Company contested the matter, but few relevant things are within the knowledge of the employer and so, it was expected from the Commissioner to examine the employer in view of provision of Rule 27 (2) of Workmen's Compensation Rules. Only on the basis of the reply given by the employer, that

claimant was working on daily wages and he was paid Rs. 50/- per day, the Commissioner presumed that the monthly wages amount was Rs. 1300/-. It was submitted that due to this approach of the Commissioner, much less amount than the entitlement is given by the Commissioner.

17. The learned counsel for the appellant/claimant placed reliance on some reported cases like ACJ-2010-0-1971 SUPREME COURT OF INDIA [Sri. B.T. Krishnappa Vs. Divisional Manager, United Insurance Company Ltd.], ACJ-2010-0-1459 SUPREME COURT OF INDIA [Manoj Rathaur Vs. Anil Raheja] and Manoj Rathaur Vs. Anil Raheja and Others, . These three cases are on the provisions of Motor Vehicle Act. The facts of these reported cases were also different. When the claim is made under the provision of the Act, the aforesaid provisions need to be considered and used for calculation of compensation. The provisions of the Act are self sufficient, but the evidence of the nature discussed above needs to be given. This Court holds that in the present case, the observations made in the aforesaid three cases are of no help to the appellant. However, for giving finding on monthly wages of the claimant and the factor which needs to be adopted, the matter needs to be reconsidered by the Commissioner.

18. On the second point, the learned counsel for the claimant placed reliance on the case reported as Udhav Rangnathrao Pawar Vs. Sheshrao Ramji Jogdand and The Branch Manager . The learned Single Judge of this Court has considered and discussed three cases of the Apex Court on the point of penalty, which can be given to claimant and the cases are reported as Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, , AIR 1997SC 3854 [Ved Prakash Garg Vs. Premi Devi] and National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another, . The learned Single Judge of this Court has held that the case of Pratap Narain Singh Deo was decided by larger bench and the other case of Ved Prakash Garg cited supra need to be used as the law laid on the point. It is observed that in the subsequent case viz. Mubasir Ahmed's case, the Apex Court has not considered the ratio laid down in the two cases already decided and so, the ratio laid down in the case of Pratap Nairan's case cited supra need to be used. The relevant paras from the judgment of the learned Single Judge of this Court are 12, 21, 31 and 32 and they are as under:-

12. Section 3 of the said Act deals with the employers liability for compensation. Sub-section (1) of section 3 of the said Act states that if personal injury is caused to a workman by an accident arising out of and in the course of his employment, his employer shall be liable to pay the compensation in accordance with this chapter. What is the amount of compensation, which is required to be paid by the employer to the workman under sub-section (1) of section 3, is specified u/s 4. Section 4-A of the said Act deals with the compensation to be paid when due and the penalty for default. Sub-section (1) of section 4-A states that the compensation shall be paid as soon as it "falls due". Sub-section (3) of section 4-A states that where any employer is in default in paying the

compensation under this Act, within one month from the date it "fell due", the Commissioner can direct in terms of clause (a) that the employer shall, in addition to the amount of arrears, pay simple interest thereon, at the rate of 12 per cent per annum. Clause (b) further empowers the Commissioner to direct the employer to pay, in addition, a further sum not exceeding 50 per cent of such an amount by way of penalty, if, in his opinion, there is no justification for delay in payment of arrears and interest. However, the only rider on imposition of penalty under clause (b) is that the employer has to be given a reasonable opportunity to show cause why the order imposing the penalty should not be passed.

21. Thus, the decision of the larger bench in Pratap Narain's case would bind this Court and hence, it is held that the compensation payable in such cases would be on the date of accident, irrespective of any dispute regarding total denial of liability or denial of liability to the extent claimed as against the accepted sum. The expression "falls due" employed under sub-section (1) of section 4-A of the said Act shall have to be, therefore, construed with reference to the date of accident only. Any other construction would defeat the object of sub-section (1) of section 3 of the said Act, which is to make the compensation immediately available for the benefit of the claimants, whose bread winner might have been seriously injured or might have lost his life.

31. Now, turning to the question of imposition of penalty under sub-clause (b) of sub-section (3) of section 4-A of the said Act, the Apex Court has held in Ved Prakash's case (supra) that the penalty is required to be levied under the said provision after issuing show cause notice to the employer concerned who will have a reasonable opportunity to show cause why, on account of some justification on his part for the delay in payment of the compensation amount, he is not liable for this penalty. It has further been held that if ultimately, the Commissioner after giving reasonable opportunity to the employer to show cause, takes a view that there is no justification for such a delay on the part of the insured employer and because of his unjustified delay and due to his personal fault he is held responsible for the delay, then the penalty would be imposed on him. It has further been observed that so far penalty is concerned, the same is not automatic flowing from the main liability incurred by the insured employer under the said Act.

32. This judgment in Ved Prakash's case has been followed in un-reported judgment of this Court in Nandi Sahakari Sakhar Karkhana's case (supra). It has been held that a show cause notice was required to be issued to the employer calling upon him to furnish the explanation for the delay caused in making the payment of arrears. Upon receipt of the explanation from the employer, if the Commissioner is not satisfied then the penalty to the extent of maximum 50 per cent of the amount of compensation determined is required to be paid by the employer. The order impugned in the present case is a composite order determining the compensation payable by the employer imposing the interest on the arrears of the amount of compensation and imposing penalty for failure to

furnish the satisfactory explanation. The show cause notice contemplated by clause (b) of section 3 of section 4-A of the said Act is with reference to the arrears of the amount of compensation determined to be payable by the employer along with the interest payable thereon. This finding would arise only upon determination of the compensation by the Commissioner u/s 19 of the said Act. Hence, the show cause notice contemplated is after passing of the order by the Commissioner determining the compensation. In view of this order imposing penalty of Rs. 45,000/- to the extent of 50% of the amount of compensation of Rs. 90,000/- determined by the Commissioner, needs to be quashed and set aside with a direction to the Commissioner to issue a show cause notice providing the appellant / employer a reasonable opportunity of being heard in the matter and to furnish the explanation for the delay caused in making the payment of arrears of compensation and interest, and thereafter to pass an appropriate order.

19. In view of the aforesaid position of law and the facts of the present case, it can be said that there was sufficient material to make out the case for imposing penalty on owner. The Commissioner ought to have considered the case from the angle discussed above. This Court holds that for following the procedure like issuing show cause notice to the employer, for giving the opportunity in respect of imposition of penalty, the matter needs to be remanded back. So substantial questions of law (i) and (iii) are answered accordingly, in favour of claimant. The remaining substantial question of law is answered against the appellants/claimant. In the result, the following order.

ORDER

(I) The appeal is partly allowed with no order as to costs.

(II) The judgment and order of the Commissioner to the extent mentioned above is set aside.

(III) The matter is remanded back to the Commissioner for taking the decision on the point of calculation of compensation in view of the observations made in this decision and also for following the procedure for considering the point of imposition of penalty and for giving findings on those points again.

(IV) Remaining portion of the judgment and order of the Commissioner is maintained.

(V) Parties to appear before the Commissioner on 23.7.2014.