
(2019) 09 SHI CK 0017

In the High Court Of Himachal Pradesh

Case No : First Appeal From Order (WCA) No. 397 Of 2011

Jaswant Singh

APPELLANT

Vs

Sunaina Devi And Another

RESPONDENT

Date of Decision : 05-09-2019

Acts Referred:

Workmen Compensation Act, 1923 — Section 3, 4A, 4(i)(c), 4(i)(c)(ii), 4(i)(c)(iii)

Citation : (2019) 09 SHI CK 0017

Hon'ble Judges : Vivek Singh Thakur, J

Bench : Single Bench

Advocate : Rupinder Singh, Gurdev Negi, Rajiv Rai, Ashwani K. Sharma, Mayank Sharma

Final Decision : Partly Allowed

Judgement

Vivek Singh Thakur, J

1. The instant appeal has been preferred by claimant-employee driver, under Section 3 of Workmen Compensation Act (Now Employee's Compensation Act and hereinafter referred to Act), against order dated 31.8.2011, passed in Petition No. 29/2 of 2011/03, titled as Jaswant Singh Vs. Sunaina Devi and another by learned Employee's Compensation Commissioner-II, Nahan, District Sirmaur, H.P(hereinafter referred to as Commissioner).

2. In present case, learned Commissioner in a Claim Petition preferred by present appellant-claimant, being driver of respondent No.1, for injuries caused to him in an accident when he was driving truck owned by respondent No.1, has awarded compensation of Rs. 1,38,222/- only payable by respondent No.2-Insurance Company. Interest @ 12% per annum from the date of filing of the application till entire amount is paid as well as penalty of Rs. 69,111/- has also been awarded but only in the event of default in payment of amount of compensation within a period of one month by respondent No.2-Insurance Company from the date of order dated 31.8.2011.

3. Being aggrieved and dissatisfied with impugned order, present appeal has been preferred, which has been admitted on 25.11.2011, on following substantial questions of law:-

1. Whether in the facts and circumstances the workmen Compensation in WCA Act, 1923, the learned Commissioner is competent to calculate the amount of interest at the rate of 12% from 30 days after the accident or not?

2. Whether the learned Commissioner below erred in law by not awarding the penalty amount as envisaged in the Act and thereby caused grave miscarriage of justice?

3. Whether the Commissioner was right in computing the compensation amount without taking into consideration the extent of disability more so, when the claimant was driver, and has been totally disabled from pursuing his profession?

4. I have heard learned counsel for the parties and have also gone through the record.

5. At the very outset, while addressing the arguments on substantial question of law No.1, learned counsel for the appellant-claimant has clarified that at the time of framing of question, claim was set for 12% interest from 30 days after accident, whereas in the light of judgment dated 2.11.2018, passed by Apex Court in Civil Appeal No. 7470 of 2009, titled as North East Karnataka Road Transport Corporation Vs. Smt. Sujatha, 2018 SCC Online SC 2296, appellant-claimant is entitled for interest from the date of accident.

6. Learned counsel for respondent No.2-Insurance Company has contested the claim of the appellant-claimant by stating that learned Commissioner has rightly awarded the amount from the date of filing of the claim petition and in any case the appellant-claimant is not entitled for the interest from the date of accident but only from one month after the accident, as in view of provisions of the Act, the amount of compensation becomes due only after one month of the accident.

7. In the judgment of Apex Court passed in North East Karnataka Road Transport Corporation's case, an earlier judgment of Apex Court in Pratap Narain Singh Deo Vs. Srinivas Sabata and another (1976) 1 SCC 289: AIR 1976 SC 222, it is held that any employer becomes liable to pay compensation as soon as the personal injury is caused to the workman in the accident which arose out of and in the course of employment and accordingly it was held that it is the date of accident and not the date of adjudication which is material, for determining the point of time from which interest on the amount of compensation under Section 4A of the Act is payable on the compensation (See Para 20, 21 and 30) . In view of ratio reiterated by Apex Court in North East Karnataka Road Transport Corporation's case, appellant-claimant is held entitled for interest on the awarded sum at the rate of 12% per annum from the date of accident i.e. 1.6.2003. Substantial question of law No.1 is decided accordingly.

8. Substantial question of law framed at Sr.No.2 that learned Commissioner had

erred in law by not awarding penalty amount as envisaged in the Act causing grave miscarriage of justice, has not been pressed by learned counsel for the appellant-claimant, therefore, there is no necessity to discuss the evidence and law on this question and adjudicate the same.

9. Undisputedly injury in present case falls within purview of Section 4(i) Clause (c)(iii) of the Act. Considering the provisions of law and evidence on record, especially disability certificate Ext. PW3/D, learned Commissioner has considered the loss and earning capacity of the appellant-claimant @ 40% and has determined the compensation amount accordingly.

10. Claim of the appellant-claimant is that he was driver by profession and in the accident he has suffered fracture in spinal cord and the said injury is permanent in nature having least possibility of improvement and on account of the said injury, appellant-claimant is not able to drive the vehicle which was his profession and thus has suffered 100% loss of earning capacity which has not been taken into consideration by learned Commissioner for determination of amount of compensation and determination of compensation by considering 40% disability on the basis of disability certificate, Ext. PW3/D, issued by the Medical Board indicating 40% permanent physical disability, is against the law and facts and circumstances of the case.

11. Reliance has been put on behalf of complainant on the judgment passed by Hon'ble Supreme Court in case Mohan Soni Vs Ram Avtar Tomar and others, (2012) 2 Supreme Court Cases 267 to substantiate his claim, wherein it was considered that loss of one of the legs either to marginal farmer or the cycle-rickshaw-puller, keeping in view nature of profession /occupation of injured, would be the end of the road insofar as their earning capacity is concerned and evaluation of loss of earning capacity @ 50%, on the basis of disability certificate indicating physical disability of injured employee @ 50%, was considered to be erroneous. It is contended on behalf of the appellant-claimant that in present case, in view of the nature of profession and injury caused, appellant-claimant has suffered 100% loss of earning as the Medical Board as well as PW3-A Dr. M.L. Gupta in Ext. PW3/D in uncertain terms have stated that the appellant-claimant has suffered a disability, which is of permanent in nature and appellant-claimant in his claim petition as well as in his deposition has asserted that he is not able to drive the vehicle on account of injury.

12. Learned counsel for respondent No.2-Insurance Company has also put a reliance on the judgment relied upon by the appellant-claimant passed by the Apex Court in Mohan Soni's case and a further reliance has been placed on judgment of the Apex Court in case Oriental Insurance Company Limited Vs. Mohd. Nasir and another, (2009) 6 Supreme Court Cases 280, wherein mode and manner in which the percentage of loss of earning capacity is required to be calculated has been discussed for the purpose of calculating the amount of compensation.

13. In Mohd. Nasir's case, it is held that the statute provides for determination, of the extent of physical disability suffered, by a qualified Medical Practitioner so as to enable him to assess the loss of earning capacity and while determining the amount of loss of earning capacity, the Tribunal or the Court must record reasons for arriving at their calculation. In Mohan Soni's case, it is also held that any scaling down of the compensation should require something more tangible than a hypothetical conjecture that notwithstanding the disability, the victim could make up for the loss of income by changing his vocation or by adopting another means of livelihood.

14. Section 4 (i) Clause (c) (ii) of the Act provides award of compensation payable in case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by qualified Medical Practitioner) permanently caused by the injury. Explanation II to Clause (c) of Section 4 (i) of the Act provides that in assessing of loss of earning capacity for the purpose of Sub Clause (ii), the qualified Medical Practitioner shall have due regard to the percentage of loss of earning capacity in relation to different injuries specified in Schedule-I. Therefore, loss of earning capacity is to be assessed on the basis of assessment made by qualified Medical Practitioner. For establishing percentage of loss of earning, it would be necessary to prove effect of injury on working ability and capacity of injured keeping in view nature of his job. For the said purpose opinion of Medical Practitioner would definitely have say, however, undoubtedly, extent of loss of earning can also be proved by leading any other relevant, cogent, tangible and convincing evidence.

15. In present case, in claim petition, appellant-claimant has claimed that he is unable to drive vehicle in future and his future has become completely dark. In his deposition in the Court he has stated that on account of injuries received in the accident he has become permanent disabled. His physical disability to the extent of 40% has been determined by the Medical Board and certificate to that effect, Ext. PW3/D, has been proved on record by PW3-A Dr. M.L. Gupta.

16. As discussed in the pronouncements of Apex Court, keeping in view the vocation and nature of work of the job of the injured, his loss of earning can be more than or less than percentage of disability determined by the Medical Board suffered by him in the accident on account of injuries and loss of earning capacity, in a case, may also be equivalent to percentage of permanent disability determined by the Medical Board.

17. In case in hand physical disability suffered by appellant-claimant in the accident has been determined by Medical Board to the extent of 40% permanent disability but in his statement PW3-A, Dr. M.L. Gupta, in his examination-in-chief, has not stated anything about loss of earning, much less percentage of loss of earning, to be suffered by the appellant-claimant on account of the said disability. Rather in cross-examination, he has stated that at the time of issuing of disability certificate after the accident, there was sufficient improvement in the condition of appellant-claimant. He has further qualified that after issuing of the

said certificate there is least possibility of improvement but he has categorically stated that despite aforesaid disability appellant-claimant can drive the vehicle. The certificate Ext. PW3/D only indicates the percentage of disability but not loss of earning capacity. PW3-A, Dr. M.L. Gupta, is silent about the loss of earning capacity but in cross-examination he has rebutted the claim of the appellant-claimant that he is totally unable to drive any vehicle in future. Appellant-claimant, examined as PW3, in his deposition, has not stated anything specifically with respect to loss of earning. He has only stated that he has become handicapped completely, so far as issue with regard to capability to drive the vehicle in future is concerned, he has avoided to depose anything on this count except stating in cross-examination that now he is not driving the vehicle of the owner of the truck involved in the accident, which is not sufficient to construe that he is unable to drive the vehicle at all. Therefore there is no tangible and convincing evidence on record to establish that there is 100% loss of earning capacity on account of the injuries received in the accident and in such circumstances, learned Commissioner had no other option except to take disability certificate, Ext. PW3/D into consideration to determine the loss of earning capacity on the basis of percentage of physical disability proved on record. Therefore, I find no scope for enhancing the compensation amount as claimed and thus compensation as determined by learned Commissioner is maintained. Substantial question of law No.3 is answered accordingly.

18. In view of above discussion, appeal is partly allowed and appellant-claimant is held entitled for 12% interest per annum from the date of accident i.e. 1.6.2003 till payment of the entire amount of compensation without any rider or condition which was imposed by learned Commissioner and the impugned order of learned Employee's Compensation Commissioner-II, Nahan, District Sirmaur, H.P. dated 31.8.2011 is modified accordingly. Respondent No.2-Insurance Company is directed to deposit the balance amount of compensation i.e. upto date interest @ 12% per annum on the basic amount of compensation of Rs. 1,38,222/- from the date of accident (1.6.2003) till deposit/payment of compensation amount within a period of six weeks from the receipt of the order through its counsel or production thereof by the appellant-claimant whichever is earlier.

Appeal is disposed of in aforesaid terms, so also pending miscellaneous applications, if any. Record be sent back.