

(2021) 10 SHI CK 0015

In the High Court Of Himachal Pradesh

Case No : First Appeal Order (WCA) No. 279 Of 2012

Meena Ram

APPELLANT

Vs

Vinay Nanda And Others

RESPONDENT

Date of Decision : 08-10-2021

Acts Referred:

Employee's Compensation Act, 1923 — Section 2(1)(I), 4, 4A, 4A(b), 4(1)(b), 4(1)(c)
(ii)

Citation : (2021) 10 SHI CK 0015

Hon'ble Judges : Satyen Vaidya, J

Bench : Single Bench

Advocate : Virender Singh Chauhan, Vivek Darehal, Chauhan, Amit Himalvi

Final Decision : Disposed Of

Judgement

Satyen Vaidya, J

1. By way of instant appeal, appellant has assailed award dated 08.06.2012 passed by the Commissioner under Employees Compensation Act (for short 'Commissioner') in Case No.9-2 of 2011/2008.

2. Appellant was employed as driver by respondent No.1 to drive a bus. During the course of his employment with respondent No.1, on 02.05.2007, the bus owned by respondent No.1 met with an accident while being driven by the appellant. Appellant suffered multiple injuries. His right arm got seriously fractured, resulting in permanent disablement to the extent of 40% to the appellant.

3. Appellant approached the Commissioner for award of compensation under the Employees Compensation Act (for short 'Act'). His specific case was that though the disability suffered by appellant was assessed at 40% but due to the nature of the injuries/disability, he was unable to drive the commercial vehicle, therefore, his loss of earning capacity was to the extent of 100%. His plea before the Commissioner was that he was paid Rs.5000/-per month as salary, besides

Rs.100/- per day as daily allowance.

As per appellant, his age was 41 years at the time of accident. He accordingly prayed for grant of Rs.6,00,000/- as compensation alongwith interest and penalty.

4. Respondent No.1, being owner of the vehicle, contested the petition on the grounds that he had suitably compensated the appellant immediately after the accident and, as such, he was estopped from filing the petition. The factum of employment of appellant as also the accident was not denied. It was, however, denied that the appellant had been totally disabled from being driving the vehicle. It was stated that the salary of appellant was Rs.3500/- per month and there was no allowance paid to the appellant in addition to the salary.

5. Respondent No.2 being insurer of the vehicle vide its separate reply has denied each and every averment made by the appellant. Respondent No.2 had raised specific objection that the person driving the vehicle at the time of accident was not holding valid and effective driving licence. The vehicle was being driven in violation of terms and conditions of the insurance policy. The petition was termed to be collusive between the appellant and respondent No.1.

6. On the pleadings of the parties, the following issues were framed on 06.08.2009:

1. Whether the petitioner is entitled for compensation? If so, to what extent and from whom? OPP

2. Whether the petition is not maintainable in this form? OPRs

3. Whether the petitioner is estopped from filing the present petition due to his own acts, deeds and conduct? OPRs

4. Whether the petitioner has been duly compensated immediately after the accident by respondent No.1? OPR-1.

5. Whether the vehicle in question was driven in violation of terms and conditions of the Insurance Policy? OPR-2.

6. Relief.

7. The Commissioner decided issue No.1 in affirmative and all other issues were decided in negative. An award of Rs.1,74,115.20 alongwith interest @ 12% per annum w.e.f. 2. 6.2007 was passed. The Commissioner assessed the above said compensation by taking total wages of the appellant as Rs.7500/-per month, but confined the same at Rs.4000/- per month for the purposes of assessment of compensation in accordance with the provisions of Section 4A of the Act as it stood on the date of accident. The disability was assessed at 40%. By application of relevant factor, the sum was adjudged in the aforesaid terms.

8. Aggrieved against the award passed by the Commissioner, the appellant has assailed the same primarily on the grounds that the restriction of income at

Rs.4000/- per month by the Commissioner was against the law as the cap of Rs.4000/-per month fixed under Section 4A of the Act was removed in the year 2010 and secondly that the appellant had suffered loss of 100% earning capacity as he was not able to drive the commercial vehicle much less the bus.

9. Initially, the appeal was admitted on 17.07.2012 on a single substantial question of law as under:

"Whether the learned Commissioner below has wrongly assessed the income of the appellant and erred in awarding penalty against the respondents?"

10. During the course of hearing, on an application filed by the appellant, another substantial question of law was framed on 1. 10.2021 to the following effect:

"Whether the injury sustained by the appellant/claimant to the extent of 40% disability which renders him incapable of performing his employment can be determined as 100% functional disability?"

11. Heard.

12. As regards the first substantial question of law framed on 17.7.2012, it can be noticed that the findings of the Commissioner with respect to monthly income of appellant as Rs.7500/- per month had become final against the respondents as none of them had assailed such findings. Now, the question arises whether the Commissioner had rightly restricted the income at Rs.4000/- per month for assessment of compensation under the Act? The answer, without any doubt, is Yes. The date of accident is 02.05.2007 and at that stage the relevant provision of the Act provided for capping of monthly wages of an employee at Rs.4000/- even where an employee was able to prove the payment of monthly wages in excess of Rs.4000/ -. This was the situation prior to 18.01.2010, whereafter by virtue of amending Act 45 of 2009 Explanation-II to Section 4 had been deleted.

13. It is no more res integra that a person becomes entitled to compensation under the Act on the date on which cause of action arises. In this case, the cause of action arose on 02.05.2007 i.e. before the Act 45 of 2009 came into being. The provisions of the said amending Act have no retrospective effect. Reference can be made in this regard to the judgments rendered by the Hon'ble Supreme Court in Kerala State Electricity Board and another vs. Valsala K. and another (1999) 8 SCC 254 and also K. Sivaraman and others vs. P. Sathishkumar and another (2020) 4 SCC 594. Thus, no fault can be found in the findings recorded by the Commissioner to this effect.

14. Insofar as the non-grant of penalty is concerned, the impugned award is completely silent. Section 4A (b) of the Act provides that if, in the opinion of the Commissioner there is no justification for delay in payment of compensation by employer to the employee under Section 4 of the Act, the Commissioner shall direct the employer to pay by way of penalty, a further sum, in addition to the amount of compensation and interest thereon, exceeding 50% of such amount

by way of penalty.

15. As observed earlier, the Commissioner has not taken this aspect of the matter into consideration. In the given circumstances of the case, in my considered view, no reasonable or plausible justification was placed and proved on record by respondent No.1 (owner of the vehicle) for delay in payment of compensation. The case of respondent No.1 that he had suitably compensated appellant immediately after accident and had also incurred expenses for his treatment, has remained not proved and has attained finality. The Act being beneficial legislation has to be applied in favour of the employee except there are justifiable reasons to withhold the benefits of the Act. No purpose shall also be served by remanding the case back to the Commissioner only for this purpose as it will cause further agony to the claimant/appellant, who despite being entitled to compensation in the year 2007 is fighting his legal battle even after 14 years. The appellant is thus held entitled to penalty to the extent of 50% of the total amount of compensation hereafter awarded in his favour.

16. The second substantial question of law arises from issue with respect to sufferance of the extent of loss of earning capacity by the appellant. The document Ex.PW-3/C is the disability certificate issued by a Medical Board in favour of the appellant whereby the appellant is certified to have suffered permanent disability to the extent of 40%. The entitlement of appellant for compensation, in the given circumstances, shall be dealt with in Section 4 (1) (c) (ii). As per this provision of law, the appellant is entitled to 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. The Section unequivocally speaks about the assessment of compensation to be made in proportion to the loss of earning capacity permanently caused by the injury. The case of the appellant is that he has been disabled totally from driving the bus and other commercial vehicle. His statement on oath to this effect has remained unshattered. In addition, PW-3 Dr. Ravinder Mokta while deposing before the Commissioner as a witness, has categorically stated that with the injury suffered by the appellant he would not be able to drive the commercial vehicle. In his cross-examination also, a similar suggestion has been put to this witness on behalf of respondent No.2, which has been answered by the witness in affirmative. PW-3 however, admitted that the appellant can drive light motor vehicle. This evidence has remained unrebutted. This being so, there is no escape from conclusion that the appellant though had suffered 40% disability, had suffered the loss of earning capacity to the extent of 100% as he was rendered incapable of performing the work which he was capable of before the accident. Section 2 (1) (I) of the Act defines total disablement as under:

"2(1)(I) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates (an employee) 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 percent or more."

17. Four Judges Bench of the Hon'ble Supreme Court in Pratap Narain Singh Deo vs. Srinivas Sabata and another (1976) 1 SCC 289 held as under:

"The expression "total disablement" has been defined in Section 2(1) (I) of the Act as follows:

"(I) "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."

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

"The injured workman in this case is carpenter by profession.... By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only."

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to item 3 of Part II of Schedule I, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less than 4 1/2" below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established."

18. In Puran Dutt vs. H.R.T.C. 2006 (3) Shim.L.C. 222, a Co-ordinate Bench of this Court in paras 7 and 8 held as under:

7. From a bare perusal of the Act and the judgment of the Apex Court it is clear that if in a particular case from the evidence led on record it is proved that the workman has been incapacitated to do the work which he was capable of performing before the accident it would mean that he is totally disabled and his loss of earning capacity is 100 per cent.

8. In the present case claimant himself has stated that he cannot work as a driver. In this behalf he has also examined Dr. Anil Bansal, Orthopaedic Surgeon, Zonal Hospital, Solan as PW 2 who clearly stated that the workman shall be unable to do the work of driving. Similarly, Dr. Dinesh Rana, PW 3, has stated that though the disability of the claimant is 30 per cent, as far as his loss of

earning capacity is concerned, it is 100 per cent since he is unable to drive a vehicle. He also states that he has given this opinion on the application of the H.R.T.C. In fact, the evidence led by the respondent H.R.T.C. itself clinches the matter. The respondent examined one Jagdish Chand as RW 1 who has stated that Puran Dutt (appellant) was found unfit to do the job of a driver and, therefore, he was compulsorily retired from the H.R.T.C. It is thus clear that loss of earning capacity as far as the appellant is concerned was 100 percent and the compensation should have been assessed by taking the appellant to have suffered permanent total disablement. Question No. 1 is answered accordingly."

19. In *Chanapa Nagappa Muchalagoda vs. Divisional Manager, NIC Limited* 2020 (1) Him.L.R. (SC) 269, the Hon'ble Supreme Court while dealing with almost identical fact position, as in the instant case, has held as under:

"9. Aggrieved, the Appellant has filed the present Civil Appeal before this Court for enhancement of the compensation awarded by the High Court. We have heard the learned Counsel appearing for the parties, and perused the pleadings on record.

It is the admitted position that the Appellant can no longer pursue his vocation as a driver of heavy vehicles. The medical evidence on record has corroborated his inability to stand for a long period of time, or even fold his legs. As a consequence, the Appellant has got permanently incapacitated to pursue his vocation as a driver.

This Court in *Raj Kumar v. Ajay Kumar and Ors.*, (2011) 1 SCC 343. held that:

"10. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will

not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may." (emphasis supplied)

10 . In *K. Janardhan v. United India Insurance Co. Ltd .*, (2008) 8 SCC 518, this Court examined the loss of earning capacity in the case of a tanker driver who had met with an accident, and lost one of his legs due to amputation. The Commissioner for Workmen's Compensation assessed the functional disability of the tanker driver as 100% and awarded compensation on that basis. The High Court however, referred to Schedule I to the Workmen's Compensation Act, 1923, and held that loss of a leg on amputation resulted in only 60% loss of earning capacity. This Court set aside the judgment of the High Court, and held that since the workman could no longer earn his living as a tanker driver due to loss of one leg, the functional disability had to be assessed as 100%. In *S. Suresh v. Oriental Insurance Co. Ltd. & Anr.*, (2010) 13, SCC 777, this Court held that :

"8. ... We are of the opinion that on account of amputation of his right leg below knee, he is rendered unfit for the work of a driver, which he was performing at the time of the accident resulting in the said disablement. Therefore, he has lost 100% of his earning capacity as a lorry driver, more so, when he is disqualified from even getting a driving license under the Motor Vehicles Act."

(emphasis supplied)

The aforesaid judgments are instructive for assessing the compensation payable to the Appellant in the present case. As a consequence of the accident, the Appellant has been incapacitated for life, since he can walk only with the help of a walking stick. He has lost the ability to work as a driver, as he would be disqualified from even getting a driving license. The prospect of securing any other manual labour job is not possible, since he would require the assistance of a person to ensure his mobility and manage his discomfort. As a consequence, the functional disability suffered by the Appellant must be assessed as 100%.

11. We affirm the judgment of the High Court on assessing the income of the Appellant at Rs. 4,000/- p.m. as per the evidence of his employer. The "functional disability" of the Appellant is assessed as 100%, and the relevant factor would be 201.66 as per Schedule IV to the Act. Consequently, the compensation payable to the Appellant would work out to Rs. 4,83,984/- under Section 4 of the Act."

20. From the above noted exposition of law, it can be said with certainty that the appellant having suffered loss of earning capacity to the extent of 100% was entitled for grant of compensation as per Section 4 (1) (b) of the Act. 60% of the monthly income of appellant (Rs.4000/- per month) was to be multiplied by the relevant factor which in this case would be 181. 37 on the basis of age of the appellant being 41 years. The appellant was, therefore, entitled to a compensation of $\text{Rs.}2400 \times 181.37 = 4,35,288/-$ on the date of accident i.e. 02.05.2007. Since the petitioner was not paid the due compensation within reasonable time, he is entitled to interest @ 12% per annum on the aforesaid compensation amount with effect from 02.05.2007 till the date of actual payment. In addition, the appellant is also entitled to the penalty as quantified hereinabove.

21. It has been contended on behalf of respondent No.2 that as per statement of PW-3, the appellant could drive light motor vehicle and that would include commercial vehicle also, hence appellant cannot be said to have lost earning capacity to the extent of 100%. This argument deserves rejection for the reason that the statement of PW-3 could not be construed in the manner as suggested on behalf of respondent No.2 (Insurer). Firstly, appellant used to earn his livelihood by driving commercial heavy vehicle and secondly there is lot of difference in driving commercial vehicle and private vehicle. For driving commercial vehicle one needs to have lots of endurance and physical capacity as one has to work for long and even at odd hours whereas one can drive a private vehicle at leisure and according to one's convenience. Above all, PW-3 has specifically stated that appellant could not drive commercial vehicle which would include light commercial vehicle also.

22. Substantial questions of law are answered accordingly.

23. The impugned award is modified to the extent as noted above. Respondent No.2 has failed to prove any breach of terms of contract of insurance inter se the respondents, therefore, respondent No.2 is held liable to indemnify respondent No.1 and to pay Rs.4,35,288/- as compensation with interest @ 12% per annum from 02.05.2007 plus 50% penalty, to the appellant.

24. The appeal is disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any.