

(2011) 08 KL CK 0035
In the High Court Of Kerala
Case No : M.F.A. No. 70 of 2007

National Insurance Company Ltd.

APPELLANT

Vs

Jose, M. D. and others

RESPONDENT

Date of Decision : 17-08-2011

Acts Referred:

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

Citation : (2011) 131 FLR 327 : (2011) 3 ILR (Ker) 954 : (2012) 2 LLJ 190

Hon'ble Judges : M.L. Joseph Francis, J;K.M. Joseph, J

Bench : Division Bench

Advocate : George Cherian Thiruvalla, for the Appellant; P. Ramakrishnan and Sri T.C. Krishna, for the Respondent

Judgement

Mr. Justice K.M. Joseph

1. Appellant is the third opposite party/insurer in a claim filed by the first respondent, claiming compensation for injuries he allegedly suffered. The Commissioner has awarded a sum of Rs. 23,050 with 12% interest. In arriving at the said figure, the Commissioner has taken the loss of earning capacity of the claimant as 12%, as a construction worker.

2. We heard learned counsel for the appellant and the learned counsel for the first respondent.

3. Learned counsel for the appellant would raise two issues before us. In the first place, he would contend that this is a case where the applicant had claimed compensation u/s 4(1)(d) of the Workmen's Compensation Act (for short, "the Act"), that is, he was paid half monthly wages, as contemplated in Section 4(1)(d). Thereafter, the employee produced a certificate from a medical practitioner, certifying that he was fit to rejoin duty. Accordingly, he rejoined his employment and he was continuing with his employment. It is while so, he has filed the present application, claiming compensation u/s 4(1)(c) of the Act. He would submit that this is plainly impermissible. Secondly, learned counsel would

contend that this is a case where the loss of earning capacity has been reckoned at 12%, on the basis of the certificate of the Medical Board. But, he would contend that loss of earning capacity has been evaluated at 12% as a construction worker. This again is illegal and impermissible, in view of the decision of the Full Bench of this Court in Vanajakshan v. Joseph 2003 (2) KLT 462 (F.B.) According to him, the said judgment is an authority for the proposition that loss of earning capacity is to be considered for all work he was capable of doing and the report of the Medical Board and also the order accepting it flies in the face of the decision of the Full Bench.

4. Per contra, learned counsel for the first respondent/claimant supported the order. He would submit that there is nothing in the Act which would preclude a workman who has claimed the benefit u/s 4(1)(d) of the Act from claiming the benefit u/s 4(1)(c). He would say that if a workman suffers an injury, the Act contemplates if the conditions in Section 4(1)(d) are satisfied the disbursal of certain benefits. It is another thing to contend that he cannot later on lay a claim u/s 4(1)(c), if the conditions in Section 4(1)(c) are fulfilled, he submits. As far as the question of loss of earning capacity is concerned, the argument of the learned counsel for the appellant is that having regard to the totality of facts, in particular, the amount actually awarded, no interference is warranted.

5. In order to appreciate the contentions of the parties, it is necessary to examine the scheme of the Act. The Act is meant for providing compensation to a workman, for injury caused by accident, as is evident from the long title of the Act. Section 4 provides for compensation and it deals with four categories of cases. Section 4(1)(a) deals with the case of injury leading to death. Section 4(1)(b) deals with permanent total disablement resulting from the injury. Section 4(1)(c) deals with a case where there is permanent partial disablement resulting from the injury. Finally, Section 4(1)(d) deals with temporary disablement whether total or partial. It is apposite in this context to refer to two provisions of the Act which define the words "partial disablement" and "total disablement". They are Sections 2(1)(g) and 2(1)(1). Section 2(1)(g) defines partial disablement, which reads as follows:

2(1) (g) "partial disablement" means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement, and where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time : provided that every injury specified (in part II of Schedule I) shall be deemed to result in permanent partial disablement.

Section 2(1)(1) defines total disablement, which reads as follows:

2(1)(1) "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).

6. Section 3 provides, no doubt, that an employer shall be liable to pay compensation when there is a personal injury to an employee by accident which arises out of or in the course of employment. If we dissect Section 2(1)(g), which defines partial disablement, it falls into two parts. Section 2(1)(g), on the one hand, provides for temporary partial disablement and the second limb provides for permanent partial disablement. Temporary partial disablement is such disablement, which is of a temporary nature and which reduces the earning capacity of the employee in the employment in which he was engaged at the time of accident whereas, permanent partial disablement which is the second limb of the definition of the words "partial disablement" must be a disablement of permanent nature and it must result in the reduction of the earning capacity in every employment which he was capable of undertaking at that time. No doubt, under the definition, every injury specified in Part II of the Schedule is to be treated as resulting in permanent partial disablement. As far as "total disablement", defined in Section 2(1)(1) is concerned, it means, disablement which incapacitates an employee for all work which he was capable of performing at the time of the accident. Total disablement may be either temporary or permanent.

7. If we were to superimpose these concepts, which are found in the definition clauses on to Section 4, we would think that the following will be the result. Section 4(1)(b) is relatable clearly to Section 2(1) because it provides for total permanent disablement. In so far as total permanent disablement is concerned, there is a statutory formula provided.

8. Next, we pass on to Section 4(1)(c). Section 4(1)(c) is clearly relatable to the latter limb of Section 2(1)(g). As far as Section 4(1)(d) is concerned, it is partly relatable to Section 2(1)(g) and partly relatable to Section 2(1)(1). That is to say, in so far as the disablement is total and it is temporary, it is relatable to Section 2(1). In so far as the disablement is partial and it is temporary, it is relatable to the first limb of Section 2(1)(g). This, we would think, is the scheme of the Act.

9. A Full Bench of this Court in *Vanajakshan v. Joseph* 2003 (2) KLT 462 (F.B.) was dealing with the question as to whether a person who had lost his vision in one eye could claim the benefit of total disablement. Therein, the court inter alia held as follows:

12. A cumulative consideration of the provisions contained in Ss. 2, 3 and 4 clearly shows that the intention of the Legislature was to compensate the workman for loss of earning capacity and not for the failure to perform the duties

of the particular post on which he was actually working.

15. It is undoubtedly true that the Act is a piece of social legislation. It embodies beneficent provisions. Normally the provisions have to be liberally considered. However, while considering the provisions the plain language cannot be overlooked. The words have to be given their plain and clear meaning. In our view the Legislature has made its intention absolutely clear in unambiguous words. The compensation has to be assessed on the basis of the percentage of the loss of earning capacity. While determining the loss of earning capacity the authority has to keep in view the loss of capacity of a workman "for all work which he was capable of performing" and not for the work which he was actually doing.

We must notice here the fundamental distinction between the concept of partial disablement and total disablement. In the case of total disablement, be it temporary or permanent, there must be incapacitation. The incapacitation depending upon the time element can be permanent or temporary, whereas in the case of partial disablement, there must be a disablement, which may be temporary or permanent. However, in the case of temporary disablement, which is partial, the law only contemplates the concept of reduced earning capacity in respect of the employment in which the employee was actually engaged at the time of the accident. When it comes to partial permanent disablement, in the first place, the disablement must be of permanent nature. Secondly, the disablement must be one which reduces the earning capacity in every employment, which he was capable of doing. It is note worthy from the phraseology of Section 2(1)(g) in comparison to Section 2(1)(1) that whether it is temporary partial disablement or permanent disablement, the law only requires proof of reduced earning capacity, whereas in the case of total disablement, there is complete incapacitation. That is to say, the word "incapacitate" is not only absent in Section 2(1)(g), but the legislature has specifically incorporated the concept of reduced earning capacity in Section 2(1)(g).

10. When it comes to a claim u/s 4(1)(d), it is interesting to note that both temporary total disablement and temporary partial disablement are clubbed together and the very same compensation is provided for the claim even though there is a total difference in the concept. When a claim is made by a workman, if he is claiming compensation on the basis that there is temporary total disablement, then he is holding out that he is incapacitated from doing all work which he was capable of doing at the time of the accident. When he claims the benefit of compensation u/s 4(1)(d), claiming that there is temporary partial disablement, he is only holding out or rather he need only establish that he was having loss of earning capacity in respect of the particular employment in which he was engaged at the time of the accident. However, the law provides for the same compensation.

11. But, the question which we are called upon to consider is what is the effect of

the claim u/s 4(1)(d) being pursued, compensation claimed and what is more, the employee re-entering employment on the basis of the certificate issued by the medical practitioner that he is fit on the claim later on raised u/s 4(1)(c). When a claim is raised u/s 4(1)(c), as is very clear from the previous discussion we have had, the claimant must establish that there is a permanent disablement and the disablement is one which reduces his earning capacity in every employment which he was capable of undertaking at that time. If he is able to establish that, then there can be no difficulty in his laying a claim originally u/s 4(1)(d) and claiming compensation. It really depends on whether the disablement is in the first place is of a permanent nature and secondly, whether the disablement affects his earning capacity in respect of all the work he could do at the time of accident. If he is able to establish the said elements, then the fact that he has laid a claim successfully u/s 4(1)(d) would not preclude him from pursuing the claim u/s 4(1)(c). It is actually a matter for evidence. It is a matter to be decided on the facts of each case on the material which is made available before the authority. In this case, we have noticed that there is a claim sanctioned u/s 4(1)(d). He has been given half-monthly allowance. But, if the injury leaves with him permanent disablement and there is loss of earning capacity in respect of all the work he could possibly do, he can claim the benefit u/s 4(1)(c) of the Act. We also make it clear that the mere fact that he was found fit to rejoin by itself will not be a sole or clinching circumstance, though it may also have considerable weight.

12. A contention was raised by the learned counsel for the appellant that even if it is found that there is no hurdle in the claimant claiming the compensation u/s 4(1)(c) of the Act, the amount which has already been paid u/s 4(1)(d) must be adjusted. He relied on the proviso to Section 4(2), which reads as follows:

(a) there shall be deducted from any lump sum or half-monthly payments to which the workman is entitled the amount of any payment or allowance which the workman has received from the employer by way of compensation during the period of disablement prior to the receipt of such lump sum or of the first half-monthly payment, as the case may be; and

(b) no half-monthly payment shall in any case exceed the amount, if any by which half the amount of the monthly wages of the workman before the accident exceeds half the amount of such wages which he is earning after the accident.

A perusal of the same would leave us no doubt that the appellant is correct in contending that any amount which may be found payable u/s 4(1)(c), if it is so found, shall be payable only after adjusting the amounts which have been paid u/s 4(1)(d).

13. We also notice in this case that the certificate given by the Medical Board relates to the loss of earning capacity in a particular capacity, viz., as a construction worker alone. No doubt, he is aged 47 years. We would think that in the circumstances of this case, the matter may have to be redone, bearing in

view the principles which we have declared. In such circumstances, we set aside the order and remit the matter back and the Commissioner shall proceed to dispose of the matter, as early as possible, keeping in view the principles which we have enunciated in the course of our judgment. The parties will appear on 28-9-2011 before the Commissioner. The parties will be free to adduce evidence.

The appeal is disposed of as above.