

(2001) 03 AP CK 0063
In the Andhra Pradesh High Court
Case No : CMA No. 729 of 1993

National Insurance Company Ltd.

APPELLANT

Vs

Rajesh Helmandge and Another

RESPONDENT

Date of Decision : 20-03-2001

Acts Referred:

Motor Vehicles Act, 1939 — Section 96(2)
Motor Vehicles Act, 1988 — Section 149(2), 166, 167, 173
Workmens Compensation Act, 1923 — Section 19, 2(1), 21, 30, 4(1)

Citation : (2002) ACJ 1328 : (2001) 3 ALD 177 : (2001) 3 ALT 251 : (2001) 89 FLR 959

Hon'ble Judges : N.V. Ramana, J

Bench : Single Bench

Advocate : Mr. T. Ramulu, for the Appellant; Mr. S. Ashok Anand Kumar, for the Respondent

Judgement

1. This appeal is filed by the National Insurance Company Limited/ opposite party No.2 (hereinafter called "the Insurance Company") against the order dated 31-7-1992 in WC No.75 of 1990 granting compensation of Rs. 1,09,235/- to the first respondent/applicant (hereinafter called "the workman"). The opposite party No. 1 before the Commissioner for Workmen Compensation (hereinafter called "the Tribunal") is the second respondent in this appeal, he is the owner of the lorry bearing No. ADT 1209 (hereinafter called "the owner").

2. The brief facts necessary to dispose of the appeal are as follows: The workman while working with the owner on the lorry bearing No.ADT 1209 met with an accident on 25-5-1990 at a place falling within the territorial jurisdiction of the Indupur in Maharashtra State. The lorry was covered by the insurance policy given by the Insurance Company. The workman sustained grave multiple injuries, and it is alleged that he totally lost his earning capacity. According to the workman, on the date of accident he was aged 24 years and was getting a monthly salary of Rs. 1,200/-. In his case before the Tribunal in WC No.75 of 1990, filed under the Workmen's Compensation Act, 1923 (hereinafter called

"the "WC Act"), he claimed a compensation of Rs. 1,09,235/-. He alleged that the owner is not willing to pay the compensation though he was aware of the accident, and that the owner has to pay 50 per cent penalty with six per cent simple interest. The Insurance Company and the owner of the lorry filed their respective counter and contested the matter. However, during the enquiry, the Insurance Company did not cross-examine the workman before the Tribunal.

3. Having regard to the material on record, the Tribunal framed the following points for consideration:

1. Whether this Court has jurisdiction?
2. Whether the applicant was employed by opposite party No. 1? and if so, whether the accident took place while on duty?
3. What was his wage and age?
4. Whether there is delay in this case? If so, whether this Court can invoke Section 4-A(3) of the WC Act to impose 50 per cent penalty and six per cent simple interest?

4. The Tribunal relying on the decisions, *Calcutta Chemicals v. V.K. Burman* AIR 1969 Pat 379 and *Municipal Board and Another Vs. Harilal*, and an unreported judgment of this Court in WP Nos. 7461 and 7462 of 1982, held on point No.1 that the Tribunal has jurisdiction to decide the case. On point No.2, the Tribunal held that the accident took place on 25-1-1990, that on the date of accident, the workman was an employee of the second respondent/owner of the vehicle, and that on the date of accident, the workman was getting a monthly salary of Rs.1,000/-. But on the question of disability, even though the Doctor who issued Medical Certificate, Ex.A2, was not examined, the Tribunal relying on Ex.A2 and other documents namely, police panchanama, determined that the workman cannot drive the lorry, and thus he became totally disabled and lost 100 per cent earning capacity. On point No.3 as to wage and age of the workman, the Tribunal concluded as on the date of the accident, the workman was aged 24 years and was earning a monthly salary of Rs.1,000/-. On the last point, the Tribunal while invoking the provisions of Section 4-A(3) of the WC Act, imposed penalty of 50 per cent and granted simple interest at the rate of six per cent per annum, and awarded total compensation as claimed by the workman. The award of the Tribunal under the WC Act, dated 31-7-1992 is impugned in this appeal u/s 30 of the WC Act. The appeal, as against the owner of the lorry stood dismissed for default as per the order of this Court dated 21-12-1999.

5. The learned Counsel for the appellant made the following submissions:

The Tribunal has no jurisdiction to try the case as the accident took place in the State of Maharashtra, and that the penalty imposed is unsustainable as the Insurance Company is not liable to pay such penalty. In support of this contention, reliance is placed on the judgment of the Supreme Court in *New India Assurance Company Limited v. Shiv Singh* 2000 (5) Supreme 137. It is

further contended that the Tribunal erred in awarding compensation basing on the Medical, Certificate Ex.A2, and determining the percentage of loss of earning capacity/disability without examining the Doctor who treated the workman, and without examining any other medical Expert. The learned Counsel placed reliance on the judgment of the learned single Judge of this Court in *New India Assurance Co. Ltd. Vs. Sammayya M. Shankar (Workman) and Another*, . The appeal by the Insurance Company is maintainable u/s 30 of the WC Act as the question of percentage of loss of earning capacity is a question of law, and a finding based on no evidence, and a finding which is perverse, gives rise to a question of law. Reliance is placed on the judgment of this Court in *Depot Manager, A.P.S.R.T.C., Nirmal Vs. Abdul Sattar*, . Lastly it is contended that the Motor Vehicles Act, 1988 (hereinafter called "the M.V. Act") and the Workmen's Compensation Act (hereinafter called "the W.C. Act"), are independent enactment's, and therefore, the Insurance Company is entitled to raise all the grounds as are available, apart from the defences u/s 149 of the MV Act, and also additional grounds which involve substantial questions of law. The learned Counsel placed reliance on the judgment of the Karnataka High Court in *New India Assurance Co. Ltd. Vs. Raja Naika and another*, , and the judgment in *National Insurance Company Limited v. Nyaya Mailiasab Ghouse Sab Muke 1 (2000) ACC 388*.

6. The learned Counsel for the workman contended that the Insurance Company is not entitled to raise any other defences except the defences available under the provisions of Section 149(2) of the MV Act, 1988, and Section 96(2) of the MV Act, 1939. The learned Counsel submits that the decision Sammayya's case is not applicable to the facts on hand and is distinguishable. He also contended that u/s 149(2) of the MV Act, 1988, and Section 96(2) of the MV Act, 1939, the Insurance Company cannot question the quantum of compensation and the same principle applies to the claims under the WC Act. The Insurance Company, which has not cross-examined the witnesses before the Tribunal, is not entitled to raise any question as to the non-examination of the Doctor who issued the Medical Certificate, Ex.A2 in this case.

7. The rival contentions give rise to the following points for consideration:

1. Whether the Insurance Company can maintain an appeal u/s 30 of the WC Act, and whether the Insurance Company can raise defences other than those available u/s 149(2) of the MV Act, 1988?
2. Whether the determination of loss of earning capacity in relation to the extent of disability requires proof to enable the Tribunal under the WC Act to award compensation for the non-schedule items of compensation?

In Re point No. 1:

8. In Sammayya's case (supra), a learned single Judge observed:

".....when the language employed in the statute is clear and unambiguous and does not admit more than one meaning, then the Court should give effect to it.

After the Amendment Act 22 of 1984 came into force, to begin with the loss of earning capacity is required to be assessed by the qualified Medical Practitioner and by way of interpretation, it is not legally possible to hold, without offending the language, that the assessment of loss of earning capacity of the respondent-workman before the Commissioner by a qualified Medical practitioner is not a "must"; but only discretionary. At the same time, it should be noted that the permanent or partial disablement and the loss of earning capacity are not one and the same. In other words, if the Commissioner has evidence only to show the loss of partial or permanent total disablement, but not the evidence to show the actual loss of earning capacity, he cannot straight-away conclude that the loss of earning capacity of the workman is equal to the percentage of permanent or partial total disablement. That is the settled position in Law. Reference to the Case Law is not necessary. If that is so and the statute ordains that the Commissioner should have, to begin with, an assessment of the loss of earning capacity by a competent qualified Medical Practitioner for the purpose of computing the total compensation payable to a workman under the Act, then such a procedure should be adhered to and any departure from the statutorily fixed procedure should tantamount to an error of Law....."

9. In *Nyaya Mathasab's* case (supra), a learned single Judge of Karnataka High Court held:

"In my opinion, without assessing the percentage of disablement, the loss of earning capacity cannot be determined at all. In that view of the matter, while awarding compensation, in respect of the injuries suffered, the Court should take into consideration firstly, the percentage of disablement which may result in permanent or partial disablement which sometimes leads to total loss of earning capacity as the case may be.

In the case on hand, on account of the injuries suffered by the workman, it has resulted in the amputation of the ring finger as well as the little finger and there are certain restrictions over the other fingers which has resulted in disablement. It is no doubt true that the workman is a driver. When the disablement stated by the Doctor is 50% and there being amputation of only two fingers, it is rather difficult to hold that the disablement of 50% in the case of hand has resulted in 100% of the loss of earning capacity. The facts mentioned in the decision supra cannot be made applicable to the facts of the present case. In that view of the matter, the finding of the Commissioner for Workmen's Compensation fixing the loss of earning capacity at 100% is not sustainable and in view of the clear evidence of the doctor, the disablement and the loss of earning capacity has to be fixed only at 50% and not more than that. There is no dispute regarding the age of the workman, the earnings and other factors. In that view of the matter, the loss of earning capacity can only be taken as 50%."

10. The two judgments noticed above would show that the "percentage of earning capacity" is a pure question of law, and it has to be decided scrutinising the material available on record. The percentage of disablement suffered by the

workman cannot be decided by the Tribunal without having the support of medical evidence. The Commissioner before awarding compensation must take into consideration the loss of earning capacity occasioned by the accident. Simply because the doctor's certificate shows that the workman suffered 100% loss of earning capacity, it does not mean that he actually suffered 100% loss of earning capacity.

11. In *Chinnama George and Others Vs. N.K. Raju and Another*, the Supreme Court laid down as under:

"If none of the conditions as contained in sub-section (2) of Section 149 exist for the insurer to avoid liability under the policy of insurance he is legally bound to satisfy the award, he cannot be a person aggrieved by the award. In that case the insurer will be barred from filing any appeal against the award of the Claims Tribunal."

12. In *Raja Naika's case (supra)*, the Insurance Company filed an appeal u/s 30 of the WC Act questioning the quantum of compensation as excessive. The question, therefore, before the Karnataka High Court was whether the Insurance Company can raise the grounds other than those contained in Section 149(2) of the MV Act. The same was answered in the following terms: *New India Assurance Co. Ltd. Vs. Raja Naika and another*,

".....Hence, when the Insurer in a proceeding under the WC Act cannot defend an action for fixation of the liability of an employer for payment of compensation to his employee for his death or bodily injury on grounds other than those permitted by Statute under sub-section (2) of Section 149 of the MV Act, it must follow as a necessary corollary that no appeal by an Insurer u/s 30(1) of the WC Act against an award made by the Commissioner could lie on grounds other than those specified under subsection (2) of Section 149 of the MV Act, subject to further condition that such grounds involve substantial questions of law required to be considered in appeal."

13. In *Oriental Insurance Company Limited v. Gowramma* 1999 (83) FLR 341, the ratio in *Raja Naika's case (supra)* was followed. In *Kamala Devi v. Navin Kumar* 1973 ACJ 115, the Rajasthan High Court held that the provisions of Sections 95 and 96 of the MV Act, 1939 are applicable to the proceedings under the WC Act, and it is permissible for the Insurance Company only to take such defences as are available u/s 96 (2) of the MV Act, 1939.

14. In the instant case, the Doctor who gave Medical Certificate, Ex.A2 was not examined. Basing on Ex. A2, the Tribunal determined the disability as well as the loss of earning capacity at Rs. 1,000/- and awarded compensation as claimed. The question is, is it permissible for the Tribunal to rely on the Medical Certificate even if the Doctor is not examined and award compensation for loss of earning capacity?

15. The learned Counsel for the workman submits that the provisions of the

Indian Evidence Act have no application to the proceedings under the WC Act; and that Ex.A2 which was marked without any objection, is sufficient proof as to disability, and that the Tribunal can rely on Ex.A2 and award compensation, and the Insurance Company cannot challenge the finding of the Tribunal at the stage of appeal as Ex.A2 is properly admitted. He placed strong reliance on the judgment of the Supreme Court in *Sitaram Motilal Kalal Vs. Santanuprasad Jaishankar Bhatt*, , wherein it was held: (at p. 1703):

"The first question is whether Exs.97, 87 and 16 are admissible against the appellant or not. Admission of documents means admission of facts contained in the documents. The facts were not deposed to by any one and the truth of these statements was not in any way tested. To admit them would be prejudicial to the appellant and strictly speaking no provision of law makes the admissions admissible against the person other than the person making them, unless such person can be said to be bound by the admission. This condition does not obtain here. Learned Counsel for the respondent, although he attempted to do so at first, did not also rely upon them. We are of the opinion that these documents were inadmissible against the owner. With this evidence excluded there is nothing to show that the owner had employed the third defendant to drive the taxi or given him permission to drive the taxi or asked him to take a test to obtain a driver's licence. There is also nothing to show that he had given any authority to the second defendant to employ strangers to drive the taxi or to take driving test. The upshot thus is that the second defendant was a servant of the owner and the third defendant was a servant of the second defendant or at best a cleaner of the taxi. There is evidence, however, to show that the second defendant was present when the vehicle was borrowed for taking the test and had willingly allowed the third defendant to drive the vehicle for the purpose. On these facts, the question is whether the owner of the vehicle can be held responsible".

16. The learned Counsel for the workman also placed reliance on the judgment of the Supreme Court in *P.C. Purushothama Reddiar Vs. S. Perumal*, , wherein it was held:

"Before leaving this case it is necessary to refer to one of the contentions taken by Mr. Ramamurthi, learned Counsel for the respondent. He contended that the Police reports referred to earlier are inadmissible in evidence as the Head Constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility (see *Bhagat Ram v. Khetu Ram* AIR 1929 PC 110).

It was next urged that even if the reports in question are admissible, we cannot look into the contents of those documents. This contention is again unacceptable. Once a document is properly admitted, the contents of that document are also admitted in evidence though those contents may not be conclusive evidence."

17. In *New India Assurance Co. Ltd. Vs. Sammayya M. Shankar (Workman) and Another*, the Court below, i.e., Commissioner for Workmen's Compensation, on the basis of the oral and documents evidence placed before him and in the absence of any contra evidence and placing reliance on the decision of this Court in *National Insurance Co. Ltd. Vs. Mohd. Saleem Khan and Another*, considered the disablement of the workman therein as total and on that basis, and having regard to the statutory provisions of Section 4 of the Act read with Schedule-IV, determined the total compensation as Rs.92,085/-. Aggrieved by the same, the Insurance Company filed the appeal contending that the computation of compensation in the case of non-scheduled injury is required to be done strictly in terms of the provisions of Section 4(1)(c) of the Act, as amended by Amendment Act 22 of 1984, and that in the absence of assessment of loss of earning capacity of the workman by a qualified medical practitioner, as required u/s 4(1)(c)(ii), the Commissioner exceeded his jurisdiction in awarding compensation for non-scheduled injury. His Lordship, Justice S.R. Nayak, relied on the Full Bench judgment of the Kerala High Court in *New India Assurance Co. Ltd. Vs. Sreedharan*, and held that a duty is cast on the Commissioner to insist and have an assessment of earning capacity of workman by a qualified medical practitioner.

18. Be it noted that before the Amendment Act 22 of 1984, it was not necessary under the WC Act, the assessment of loss of earning capacity of the workman has to be assessed by a qualified medical practitioner. By virtue of Amendment to Section 4(1)(c)(ii) of the WC Act (as per Amendment Act 22 of 1984), the Legislature, however, made it mandatory with effect from 1-7-1984, that the Commissioner for Workmen's Compensation must insist upon production of evidence as to assessment of loss of earning capacity by qualified medical practitioner before computing compensation payable to injured workman u/s 4(1)(c)(ii) of the WC Act. Therefore, mere filing of medical certificate without Expert testimony of a medical practitioner as to the assessment of loss of earning capacity in relation to the disability suffered, would not enable the Commissioner to award compensation straightaway. The change brought about by Amendment Act 22 of 1984, regulates the procedure to be followed by the Commissioner in the matter of determining compensation payable to the workman u/s 4 of the WC Act, and the amendment, however, does not abridge or restrict the power of the Commissioner under the Act. In the light of this, the submission of the learned Counsel that at the stage of appeal, the Insurance Company, which failed to cross-examine the workman before the Tribunal, cannot be permitted to raise the ground in appeal, and that the Insurance Company has waived the right, is without any substance. After coming into force of the Amendment Act 22 of 1984, it is incumbent on the part of the Commissioner to properly assess the loss of earning capacity which can only be based on Expert medical evidence and not otherwise. In paragraph-12 of the judgment in *Sammaya's* case (*supra*), the learned single Judge also took the same view and held that even if the Insurance Company and owner did not appear before the Commissioner, still they can raise

the same contention in appeal u/s 30 of the WC Act. Therefore, on this aspect of the matter, I hold that inspite of the fact that the Insurance Company did not examine the workman in relation to the disability, the Insurance Company can still raise the question in appeal u/s 30 of the WC Act.

19. The next question is whether it is permissible for the Insurance Company to question the evidentiary value of Ex.A2, medical certificate, and whether the Insurance Company is entitled to question the quantum of compensation by raising grounds which are not mentioned in Section 149(2) of the MV Act. Elaborating the submissions, the learned Counsel for the respondents urged that the implied restrictions contained u/s 149(2) of the MV Act would also apply to the Insurance Company defending the case before the Tribunal under the WC Act. In this context, it is necessary to refer to the provisions of Section 167 of the MV Act, which reads as under:

"767. Option regarding claim for compensation in certain cases :-- Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) when the death of, or bodily injury to any person gives rise to claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."

20. A plain reading of Section 167 shows that in the event a workman suffers fatal accident or bodily injury, the compensation for the loss of life or for loss of earning capacity can be claimed either under the MV Act or WC Act. But the principles of assessment of damages by way of compensation drastically differ under the two Acts. u/s 166 of the MV Act, the claimant has to compulsory plead and prove that an accident occurred by the use of motor vehicle in a public place due to the fault of the driver of the vehicle and that the claimants or dependents entitled to claim compensation under different heads. Section 140 of the MV Act is a special provision in MV Act, which obliges the owners of the vehicles to pay a fixed Sum of Rs.25,000/- in respect of death of a person, which has resulted from an accident arising out of a motor vehicle (otherwise known as "no fault liability"). But under the WC Act, the question of negligence on the part of the workman is irrelevant and immaterial. The moment it is proved that the workman sustained injury and disablement thereby, or met with a fatal accident in the course of employment, and he is an employee of such an establishment, the absolute liability under the WC Act springs up. The theory of notional extension is not available to the workman who may claim compensation by virtue of Section 167 of the MV Act. No doubt, the burden of proof lies on the workman to prove that the accident occurred due to the rash and negligent act of tortfeasor, and the accident occurred by the use of motor vehicle in a public place. The other noteworthy difference is that the Tribunal constituted under the MV Act is a civil Court for the purpose of recording the evidence, issuing summons, summoning the witness and other incidental purposes, whereas the

Tribunal constituted under the WC Act is a quasi-judicial body, and it is not bound by the Evidence Act or CPC for all purposes. A large volume of case law supports this view.

21. The WC Act is a self-contained Code. It has its own peculiarities. u/s 30 of the said Act, the aggrieved employer or the insurer has to deposit the entire amount awarded by the Commissioner before filing an appeal. The appeal lies only on a substantial question of law. Under the MV Act, an appeal lies u/s 173, on both question of fact and law, and it can be filed by the insurer or the owner of the vehicle or the employer by depositing the amount of Rs.25,000/- or 50% of the awarded amount, whichever is less, or as directed by the appellate Court. The consideration of the appeals by the Tribunal constituted under the two Acts are different and the principles of assessment of damages for loss of life as well as loss of earning capacity is different, though basically the foundation for fastening the liability on the owner/Insurance Company or the employer is the same.

22. The Commissioner while determining the compensation under the WC Act is required to assess the damages in accordance with Schedule-I of the Act, which contains Part I and Part II. That is the purport of Section 4. Schedule-I provides the percentage of loss of earning capacity in relation to the injuries deemed to result in permanent total disablement and injuries deemed to result in permanent partial disablement (amputation cases - upper limbs or either all). No difficulty arises with reference to Section 4(1)(a)(b)(c)(i) and (d) of WC Act as the said provisions as well as Schedule-I contain the nature of injury and percentage of disablement deemed to result from such injury. u/s 19 of the WC Act, the Commissioner (Tribunal) alone is entitled to determine the question as to whether a person injured is or is not a workman or as to the amount or determination of compensation, including any question as to nature of accident, including any question as to the nature or extent of disablement. In this context, it is necessary to extract Section 19 of the WC Act, which reads as follows:

"19. Reference to Commissioner:--(1) If any question arises in any proceeding under this Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not a workman) or as to the amount or duration of compensation (including any question as to the nature or extent of disablement), the question shall, in default of agreement, be settled by a Commissioner.

(2) No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Commissioner or to enforce any liability incurred under this Act."

23. The other provisions of the Act should be read in consonance of the absolute power conferred u/s 19(1), which is made clear by Section 19(2). As already noticed, while exercising power u/s 19(1), the amount of compensation and with reference to death or injuries falling u/s 4(1)(a)(b)(c)(i) and (d), (scheduled

injuries), the Commissioner is bound to give full weight to Schedule-I. But in case of an item falling u/s 4(1)(c)(ii), the Commissioner is not entitled to resort to determine the loss of earning capacity as the said provision says that in case of an injury not specified in Schedule-I (non-scheduled injuries), the percentage of 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, is a clear indication that Schedule-I does not apply. The Commissioner/Tribunal is to be guided by the acceptable and satisfactory evidence of an Expert, i.e., qualified medical practitioner. Having regard to the conspicuous difference between the concepts of "loss of earning" and "loss of earning capacity", the Tribunal under the WC Act has to keep the difference of assessment of damages for scheduled injuries and non-scheduled injuries. This is very important because even if a workman is continued in the same employment without any deduction of earnings in case of permanent partial disablement, the same is not a determinative factor to deny compensation to the workman for his permanent partial disablement. If the other view is accepted, every employer may offer some employment to the workman to deprive the benefit under the Act. It is also possible that the establishment where the workman was working may subsequently be closed down, and in such an event, it would be well nigh impossible for the workman to get employment elsewhere, for no person would like to provide employment to a disabled workman. Under the WC Act, the payment of non-pecuniary damages is absent. But under the WC Act, any claim for pecuniary damages has to be assessed by the Commissioner with respect to cogent and convincing evidence and not with reference to Part I or Part II of Schedule I to the WC Act. For these reasons, I am of the considered opinion that the concept of damages under the MV Act and WC Act, is conceptually different and distinct. Therefore, I am unable to accept the contention of the workman that the restrictions contained in Section 149(2) of the MV Act would apply to cases under the WC Act. This point is answered accordingly.

In Re Point No. 2:

24. Insofar as the submission that it is not necessary to examine the doctor to determine the percentage of disability or loss of earning capacity, I have already held the distinction between the scheduled injuries and non-scheduled injuries, and the method of computation of compensation for damages in respect of the two - in the case of non-specified injury, the percentage of compensation payable and in the case of permanent partial disablement, the compensation proportionate to the loss of earning payable. Further, Section 4(1)(c)(i)(ii) and the explanation to the said provision clearly indicates that the evidence of qualified medical practitioner shall be relevant and the Commissioner shall have due regard to the percentage of compensation payable as assessed by a qualified medical practitioner. Therefore, non-examination of the doctor who issued medical certificate does not satisfy the requirement of law, because the Tribunal may not be in a position to determine whether the disablement would lead to

total loss of earning capacity or whether the workman suffered permanent partial disability, enabling him to discharge normal duties with the employer or any other employer. As already observed above, a workman would be entitled to compensation irrespective of his ability to work if he suffers any scheduled injuries. However, in the case of disablement sustained by him, which falls within the definition of Section 2(1)(g), for the purpose of proper adjudication and determination, the examination of the doctor to assess the loss of earning capacity in case of non-scheduled injury is essential and an unexceptionable requirement of law. Any order of the Commissioner without applying the statutory requirement of Section 4(1)(c)(ii) and explanation (ii) would be contrary to the statute, and cannot be sustained. Therefore, I hold that in case of non-scheduled injury, to assess the loss of earning capacity, it is mandatory to examine qualified medical practitioner.

25. The examination of the doctor for assessing non-pecuniary loss of earning capacity of the workman who sustained injuries, or who has suffered permanent partial disablement, is in the interest of the workman.

26. In case of non-scheduled injury, to assess the loss of earning capacity, it is mandatory to examine the qualified medical practitioner for assessing the compensation. For instance if a doctor certifies that a particular workman sustained a disability of 25% basing on that, if the Commissioner held that the workman suffered 100% loss of earnings, it can be said the Commissioner traversed beyond the scope of disability, because the doctor is an expert to say whether such disablement leads to total disablement or whether the workman lost his entire earning capacity or not. Because the permanent partial disablement entitled the workman for compensation only on the basis of loss of earning capacity. It cannot be said that in each and every case there was a total loss of earning capacity. In my opinion the loss of earning capacity should be determined basing on the medical evidence. In this context, it is relevant to consider that if the doctor was examined before the Commissioner, the employer/insurer has an opportunity to cross-examine the doctor and also in their opinion such disablement not leads to total loss of earnings, they can make an application before the Commissioner to refer the case of the workman to the Medical Board. I am afraid to accept the contention raised by the respondent that the medical certificate itself is sufficient to determine the loss of earning capacity. It is also against the interest of the workman. If the Commissioner while exercising the powers conferred u/s 19(1) held that disability is not a total disability and the certificate issued by the doctor shows only a partial disablement irrespective of the nature of injuries sustained by the workman, ultimately the workman is the sufferer. In view of that, in the interest of justice, I feel it is just and necessary to examine the doctor to determine the liability in cases where the workman sustained non-schedule injuries.

27. The contention raised by the learned Counsel for the appellant that the Tribunal has no territorial jurisdiction to try the case, as the accident took place

in the State of Maharashtra is concerned, cannot be accepted. As the claimants made an application before the Commissioner for compensation, the respondents without raising any objection, participated in the enquiry, may not entitle to raise the same at this appellate stage. In the similar circumstances, a Division Bench of this Court in *Oriental Insurance Company Ltd. Vs. Waheed Khan and Another*, , took a view that the territorial jurisdiction u/s 21 prior to its amendment, which provided for filing an application for compensation before the Commissioner, having jurisdiction over the place of accident is not mandatory, but only directory and the similar questions raised by the Insurance Company was rejected by the Division Bench of this Court. In view of that, the contention of the appellant that the Tribunal has no jurisdiction to try the case is rejected.

28. In the present case, the medical certificate was marked as Ex.A2 by the workman. He was neither cross-examined with regard to the validity of the certificate nor any objection was taken to its marking. The proceedings before the Commissioner being quasi-judicial in nature, principles of evidence certainly apply, though the Evidence Act may not be applicable as they are applied to the civil proceedings. After marking of the medical certificate neither the insurer nor the employer made any request before the Commissioner to refer the workman to medical board or to another doctor to assess and determine the percentage of disability on the basis of certificate is correct or not. Further, it is not the case of the Insurance Company that the certificate was not obtained from the qualified medical practitioner or that the disability sustained by the workman does not amount to total disablement. In the absence of any specific plea or objection before the Commissioner at this length of time after the period of about 10 years, I feel it is not proper for this Court to disturb the findings of the Commissioner that too especially when there are lapses on the part of the Insurance Company. The WC Act is a piece of beneficial legislation enacted to safeguard the interest of the workman who sustained injuries and in case of death, to safeguard the interest of the legal representatives of the workman.

29. Lastly, the submission of the Counsel for the Insurance Company that the Insurance Company cannot be burdened with penalty is a question, which is no more *res Integra*. In *New India Assurance v. Shiv Singh* (supra), the Supreme Court laid down that it is only the employer who is liable to pay the penalty and the Insurance Company cannot be fastened with penalty unless additional premium was paid to fasten such liability to the insured. The onus lies on the owner to prove that he paid additional premium. In the present case, there is no evidence to show that the owner has paid any additional premium, and therefore, the submission of the appellant is accepted and to that extent, the order of the Commissioner under appeal is set aside.

30. In the result, the CMA is partly allowed confirming the findings and the award of the Commissioner under the Workmen's Compensation Act, 1923, except the award of penalty payable by the Insurance Company, However, the workman is at liberty to recover penalty from the employer. There shall be no order as to

costs.