

(2014) 10 AHC CK 0039

In the Allahabad High Court

Case No : First Appeal From Order No. 2898 of 2014

New India Assurance Co. Ltd.

APPELLANT

Vs

Sher Singh

RESPONDENT

Date of Decision : 29-10-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 4
Employees Compensation Act, 1923 — Section 30, 4(1)(b), 4-A

Citation : (2014) 11 ADJ 259 : (2015) 1 ALJ 464 : (2015) 2 AWC 1160 : (2015) 144 FLR 32

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Advocate : Amaresh Sinha and Anubhav Sinha, Advocates for the Appellant;
Komal Mehrotra, Advocates for the Respondent

Judgement

Pankaj Mithal, J.—Heard Sri Anubhav Sinha holding brief of Sri Amaresh Sinha, learned Counsel for the appellant and Sri Komal Mehrotra, learned Counsel for the claimant-respondent No. 1. Respondent No. 2 had not contested the proceedings before the Commissioner Employee's Compensation. Parties agree for the final disposal of the appeal at the stage of admission.

2. The appeal is under section 30 of the Employees Compensation Act, 1923 against the order and award of the Commissioner Employee's Compensation Act passed in W.C. Case No. 102 of 2012 (Sher Singh v. Saudan Singh and others). The Commissioner on the claim preferred by the employee had awarded a sum of Rs. 3,31,060/- along with 12% interest from the date of the accident.

3. In challenging the award of the Commissioner four grounds have been raised before me.

First the claim petition was initially filed in 2008 but it was dismissed in default. Thereafter the second claim petition for the same cause of action was filed which is not maintainable and permissible in law. Secondly, the Commissioner has

committed an error of law in awarding interest from the date of the accident. It should have been from the date of the claim petition specially under the circumstances of this case. The third argument is that there was breach of the condition of the insurance policy and therefore, the appellant insurer is not liable to indemnify the loss. The last argument is that the claimants had suffered injury in his right leg whereupon it was amputated below the knee resulting in 50% permanent disability as per Schedule 1 to the Act, therefore, the Commissioner committed an error by treating the disability to be 70% while awarding compensation.

4. There is no dispute that the claimant-respondent No. 1 had earlier filed a claim petition which was dismissed in default. Subsequently, he had preferred the present claim petition afresh.

5. The dismissal of the first claim petition in default is not an adjudication on merits and therefore, it would not Operate as res judicata.

6. Rule 41 of the Workmen Compensation Rules, 1924 framed under the Act provides that certain provisions of the Code of Civil Procedure namely those contained in Order DC of the C.P.C. shall apply to proceedings before the Commissioner.

7. Order IX, Rule 4 C.P.C. provides that where a suit is dismissed under Rule 2 or Rule 3 that is for the absence of the parties, the plaintiff may bring a fresh suit or may apply for an order to set aside the dismissal. It means that the claimant respondent No. 1 by virtue of Order IX, Rule 4 C.P.C read with Rule 41 of the Rules is entitle to either file a fresh claim petition or to apply for the restoration of the earlier claim petition which has been dismissed in default. The second claim petition as such is not barred in law.

8. In the event he has chosen the first alternative and had filed a fresh claim petition no illegality can be said to have been committed.

9. In view of above, the first submission of the Counsel for the appellant has no merit and stands rejected.

10. As far as the argument that there is breach of condition of the insurance policy and therefore, the appellant-insurer is not liable to indemnify the loss, the burden to prove the same is upon the appellant. The appellant has not adduced any evidence to prove breach of the policy.

The argument that it was for the owner of the vehicle to have produced the licence and other necessary documents to satisfy that the vehicle was being run in accordance with the terms and conditions of the policy is of no substance.

11. The owner of the vehicle is the customer of the appellant and therefore, it is the duty of both of them to have produced necessary evidence to demonstrate the breach of the conditions of the policy. The appellant as well as the owner having failed in their attempt to prove any breach in the policy, the argument

raised cannot be accepted.

12. Section 4-A of the Act provides that the compensation under the Act shall be payable as soon as it falls due and in case it is not so paid the Commissioner is empowered to direct for the payment of simple interest @ 12% per annum or at any such higher rate not exceeding the loan rates of the scheduled bank as may be specified of the Central Bank.

13. In view of above, the Commissioner is authorised to award interest on compensation from the date it fell due.

14. The controversy with regard to the date when the compensation fell due had been set at rest by the Supreme Court in the case of *Saberabibi Yakubhai Shaikh and Others Vs. National Insurance Co. Ltd. and Others*, and it has been held that under the Act interest is payable from the date of the accident.

15. In view of above decision of the Supreme Court which has been rendered by following four Judges decision in *Pratap Narain Singh Deo Vs. Srinivas Sabata and Another*, no illegality has been admitted by the Commissioner in awarding interest from the date of the accident.

16. Lastly the evidence on record clearly establishes that the right leg of the claimant respondent No. 1 below the knee was amputated. According to the Schedule-1, Entry 20 amputation below knee would amount to 50% loss of earning capacity. The medical certificate on record however certifies the disability to be about 70% and the Commissioner has determined the compensation according to the said medical certificate.

17. The Schedule to the Act specifically provides for the loss of 50% in earning capacity on account of amputation of the leg below the knee. The said statutory provision would have precedence over the medical certificate. Moreover, it is the loss of earning capacity as provided in the schedule which is relevant for determining the compensation rather than the extent of disability. Accordingly, the compensation liable to be paid was required to be determined the loss of earning capacity of 50% as specified in the schedule.

18. In view of above, the compensation payable to the claimant-respondent No. 1 can be worked out as under:--

"Factor according to the age x monthly salary x 60% of the monthly wages as per section 4(1)(b) x 50% loss of earning capacity as per Entry 19 of Schedule 2 to the Act i.e. $197.06 \times 4000 \times 60\% \times 50\% = 2,36,472/-$."

19. In view of above, the claimant respondent No. 1 is entitled to the compensation of Rs. 2,36,472/- and interest as directed.

20. The amount of compensation awarded by the Commissioner as such is reduced from 3,31,060/- to the above amount of Rs. 2,36,472/-. The appeal is accordingly disposed of and the award of the Commissioner stands modified and reduced to the above extent.