

(2006) 01 BOM CK 0039
In the Bombay High Court
Case No : F.A. No. 17 of 1999

New India Assurance Co. Ltd.

APPELLANT

Vs

Suresh Pandurang Shinde alias Patil and Another

RESPONDENT

Date of Decision : 24-01-2006

Acts Referred:

Workmens Compensation (Amendment) Act, 1984 — Section 4
Workmens Compensation Act, 1923 — Section 11, 22, 30, 4(1), 4(1)(b)

Citation : (2006) 2 ACC 654 : (2007) ACJ 893 : (2006) 2 ALLMR 615 : (2006) 109 FLR 735 : (2006) 2 LLJ 1 : (2006) 3 MhLj 458

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : Vinayak N. Upadhye, for the Appellant; S.G. Thombre, for the Respondent

Judgement

S.B. Deshmukh, J.—This appeal is directed against the judgment and award passed by the Commissioner for Workmen's Compensation, Labour Court, Jalgaon, passed in Application (WCA) No. 62/1997, on October 7, 1998. The Commissioner for Workmen's Compensation, Labour Court, Jalgaon, allowed the Claim Application filed by the respondent No. 1 (hereinafter referred to as the applicant for short) and awarded an amount of Rs. 1,78,490/- with 9% interest per annum from the date of passing of the order till the date of deposit. The learned Commissioner for Workmen's Compensation (hereinafter referred to as the Commissioner for the sake of convenience) did not award costs, interest and penalty.

2. The appellant was opponent No. 2 in Application (WCA) No. 62/1997. The respondent No. 1 was the applicant. The opponent No. 1 in Application (WCA) No. 62/1997 is respondent No. 2 in this appeal and at the relevant time, was owner of the vehicle and employer of the applicant. The parties shall hereinafter be referred to their status in Application (WCA) No. 62/1997.

3. The background facts, giving rise to this First Appeal, may be summarised as

follows:

a) The applicant alleged in the application filed u/s 22 of the Workmen's Compensation Act, 1923 (hereinafter referred to as the Act of 1923 for convenience) against the opponents that he was holding valid driving licence and opponent No. 1, was owner of the goods vehicle i.e. Matador No. MH-19/4463 during the relevant period. The applicant was working as a permanent driver with opponent No. 1. The opponent No. 1 used to pay Rs. 2100/- (salary + allowances) per month to the applicant. The goods vehicle Matador No. MH-19/4463, was insured with the opponent No. 2.

b) On December 11, 1996 at about 9.30 a.m., on Faizpur Bhusawal Highway, the goods vehicle i.e. Matador No. MH-19/4463, which was being driven by the applicant, met with accident. The accident occurred during the course and out of employment of the applicant with opponent No. 1. The offence was registered with Faizpur Police Station, Taluka Yawal, District Jalgaon.

c) The applicant, in the accident dated December 11, 1996, suffered severe injuries. The applicant was rushed to the hospital of Dr. Santosh Chaudhari at Bhusawal, District Jalgaon. The applicant was treated and operated since he had sustained multiple fractures of right lower limb, deformity at right knee, knee joint and due to fractures, a steel rod, was required to be fitted. The applicant, was inpatient since December 11, 1996 to January 24, 1997. The applicant was advised a complete bed rest for the period of six months and was under the treatment. The applicant, was required to take treatment even, at the time of filing of the application. The applicant had incurred an expense to the tune of Rs. 40,000/- for medical treatment including medicines and hospital charges etc.

d) Since the applicant had sustained multiple fractures, of right lower limb and deformity at right knee, and as the iron rod was required to be fitted in the right leg of the applicant, the applicant was unable to move his right leg. The movements of the right leg of the applicant, were extremely restricted. The applicant, therefore, has lost his earning capacity to the extent of 100% and now the applicant is not in a position to do any job/work. The applicant was working as a Driver and it was the only source of his livelihood. The applicant is having six dependents, mother, wife and four minor children.

e) The applicant was 41 years old on the date of the accident. The applicant, is entitled to get Rs. 2,17,644/- as a lumpsum compensation with medical expenses. Total amount of Rs. 2,57,644/-, was claimed by the applicant, in this application for compensation. The notice was served to the opponents on July 1, 1997. Notice has been received by both the opponents.

e) The opponent No. 1 was served, however, did not enter the appearance and file his written statement. Opponent No. 2 after entering appearance, filed written statement, which is at Exhibit "C-8". The opponent No. 2 denied every material allegation made in the application by the applicant. The opponent No. 2 also denied that the applicant was holding valid driving licence at the time of the

accident.

4. The learned commissioner, considering the pleadings, framed as many as five issues and as noted above, allowed the application partly in favour of the applicant, holding him entitled for amount of Rs. 1,78,490/- towards compensation. Since application for No Fault Liability, was filed on behalf of the applicant and was allowed, and an amount of Rs. 25,000/- was awarded in favour of the applicant, previously, the learned commissioner, awarded an amount of Rs. 1,53,490/- to the claimant, along with interest at the rate of 9% from the date of passing of this order till the date of deposit.

5. This appeal is admitted by the Division Bench of this Court (Coram N.P. CHAPALGAONKAR & B.B. vAGYANI, JJ.,) on February 5, 1999. This appeal is filed by the opponent No. 2, u/s 30 of the Act of 1923. Having regard to the Full Bench judgment of this Court, in Gangwani and Co. Vs. Saraswati Banewar, in my view, following ground, is involving substantial questions of law:

(B) That the learned Commissioner below has erred in saddling the liability on the basis of assumption and presumption treating the disablement to the extent of 100% in particular, when medical certificate certifying 20% disablement which is marked at Exhibit U-16 and fixing the compensation disregarding it.

6. Mr. V.N. Upadhye, the learned Counsel for the appellant/opponent No. 2 in support of his submissions relied upon a Full Bench judgment of the Karnataka High Court, in the matter of Shivalinga Shivanagowda Patil and Others Vs. Erappa Basappa Bhavihala and Others, . He has relied upon a Full Bench judgment of the Kerala High Court, in the matter of New India Assurance Co. Ltd. Vs. Sreedharan, . Mr. Upadhye, the learned Counsel admits the policy and a fact that date of accident is covered within the policy period. Mr. Upadhye, the learned Counsel seriously disputes the grant of compensation holding that the applicant has sustained 100% loss in income by the learned Commissioner.

February 1, 2006:

7. The learned Counsel Mr. S.G. Thombre supports the judgment of the learned Commissioner for Workmen's Compensation. To bolster, his submission, the learned Counsel Mr. Thombre, relied on the following judgments:

i) Judgment of the Andhra Pradesh High Court in National Insurance Company Ltd., Hyderabad v. M. Shamprasad and Anr. 2006 (1) All M.R. J 17.

ii) In the matter of Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, .

iii) In the matter of Samir U. Parikh Vs. Sikander Zahiruddin, .

iv) In the matter of Iqbal Shamsoddin Ansari v. Ghazi Salauddin and Anr. 1979 Mh.L.J. 764.

v) In the matter of Sadashiv Krishna Adke Vs. M/s. Time Traders, .

8. The Opponent No. 1, despite the service, remained absent, when the matter

was pending before the learned Commissioner for Workmen's Compensation at Jalgaon. There is no other evidence, controverting the claim of the Applicant that Applicant was working as a permanent driver with opponent no. 1 as alleged. The relationship of workman and employer in between the Applicant and Opponent No. 1 stands proved. The Matador bearing registration number MH-19/4463, undisputedly, was owned by the Opponent No. 1 and said matador was being driven by the Applicant on December 11, 1996 at about 9.00 a.m. when the said matador met with the accident at Faizpur Bhusawal highway within the jurisdiction of Faizpur Police station, Tq. Yaval, Dist. Jalgaon. It is also not disputed by the Opponent No. 2 (Insurance Company) that vehicle in question was insured with the Opponent No. 2 on the date of accident i.e. December 11, 1996. The salary, as alleged by the Applicant, in the absence of any other rebuttal evidence has to be accepted to be Rs. 2,100/- + allowances.

9. The applicant has alleged that he has sustained severe injuries in the accident and was immediately rushed to the hospital at Dr. Santosh Choudhari at Bhusawal and was required to be operated on the multiple fracture, of right lower limb deformities at right knee, knee joint. Nailing was also required to be done. The applicant was indoor patient, since December 11, 1996 to January 21, 1997. This fact is also not disputed by the opponent No. 2. The medical certificate is filed on record by the applicant which is at Exhibit U-16. The medical certificate is dated January 10, 1997. The medical certificate is issued by Dr. Santosh Choudhari which is counter signed by the Medical Officer Class II Municipal Dispensary at Bhusawal. It is certified by the Medical Officer, that the applicant has got multiple fracture of right lower limb deformity at right limb and gross limitation of movements at knee joint and minimal limitation at right ankle joint resulting into twenty percent (20%)

Permanent Physical Disability

10. Medical bills are also filed on record by the applicant. The applicant has also filed on record xerox copies of the driving licence at Exhibit U-15, which seems to have been granted by the Deputy R.T.O., Jalgaon on February 18, 1988.

11. After perusal of the oral evidence of the applicant and medical certificate exhibit U-16, it is clear that the said injury sustained by the applicant in the accident, is not in the list of injuries, deemed to result in permanent total disablement in Part I of Schedule I. The injury sustained by the applicant, is also not enlisted in the list of injuries given in Part II of Schedule I of the Act of 1923.

12. In this view of the matter, it is manifest from the evidence on record that the applicant has sustained injury, within the meaning of Section 4 Sub-section (1) Sub-clause (ii) of the Clause (c) of the Act of 1923. The learned Counsel Mr. Thombre also fairly admits this position.

13. The learned Commissioner for Workmen's Compensation has referred to medical certificate Exhibit U-16, certifying 20% disability to the applicant. The learned Commissioner for Workmen's Compensation, however, referred to the

oral evidence of the applicant that due to nailing, in the foot of the applicant, the applicant cannot drive the vehicle, and therefore considering all these aspects, held that the accident arose out of and during the course of the employment and resulted into loss in 100% working capacity of the applicant. After recording this finding, the learned Commissioner for Workmen's Compensation worked out the amount of compensation and accordingly awarded the compensation in favour of the applicant. The finding of the learned Commissioner for Workmen's Compensation that the applicant was employed by the opponent No. 1 as driver and accident arose on December 11, 1996 out of and during the course of employment, is justifiable. The learned Counsel Mr. Upadhye, however, submits that the finding recorded by the learned Commissioner for Workmen's Compensation, in the absence of evidence of qualified medical practitioner, regarding alleged incapacity of the applicant, occurred on account of the employment injury, is perverse.

14. It is apposite to refer to the judgments, cited by the learned Counsel Mr. Thombre for the applicant in the matter of National Insurance Company v. M. Shamprasad (supra). In this case the date of accident is October 1, 2003 and it was a case of sustenance of injury u/s 4(l)(c)(ii) of the Act of 1923. However, in the case of National Insurance (supra), the applicant himself was examined as AW-1 and the Doctor, who certified the disability was also examined as AW-2. Documentary evidence was also filed on record. Since qualified medical practitioner/ doctor was examined and his oral evidence, alongwith the documentary evidence, was available, in my view, the ratio of the judgment, may not have application to the case on hand.

II) In Pratap Narensinghdeo v. Sabata (supra), again facts were different. The date of accident, was July 6, 1968. The applicant in that case, was working as carpenter, sustained injury, which resulted in amputation of his left arm at the elbow. Suffice it to say that it was the case of scheduled injury covered by Section 4(1)(b) of the Act of 1923. The ratio of the judgment in the matter of Pratap (supra) therefore, has no application to the facts of the present case.

III) Judgment in the matter of Sameer U. Parikh v. Sikandar Zahiruddin (supra) is a judgment of learned single Judge of Bombay High Court in First Appeal No. 780 of 1978 decided on October 11, 1983. The date of accident is September 1, 1976. The applicant workman in that case, had sustained injury, which resulted in amputation of right foot below the ankle. It appears that in the case of Sameer (supra), Medical officer was examined before the Trial Court. Thus, the facts are distinguishable. It was a case of scheduled injury governed by Section 4(l)(b) of the Act of 1923. However, while deciding the controversy in the matter of Sameer (supra), the learned single Bench of this Court, has considered the scheme of Section 4 alongwith Rules of the Act of 1923. It is interesting to note that Section 4, is subsequently amended by Section 4 of the Act No. 22 of 1984. Amendment was made enforceable from July 1, 1964. In other words, the provisions laid down u/s 4, though, was considered in the matter of Sameer

(supra) by the learned single Judge of this Court, it was unamended provision and therefore, said judgment is not helpful to the case of the Applicant in the case on hand.

IV) The learned Counsel Mr. Thombre has also referred to a Division Bench judgment of the Bombay High Court, in the matter of Iqbal Sha Ansari v. Ghazi Salauddin (supra). In the matter of Iqbal (supra), date of accident was July 3, 1968 and leg of the workman in that case was required to be imputed upto knee and permanent partial disablement was certified upto 40%. The facts are altogether different. It is a case of scheduled injury and date of injury is also before amendment. In my view, therefore, this judgment is also not helpful to the applicant, in the case on hand.

V) In the matter of Sadashiv Krishna v. Time Traders (supra), the date of accident was June 23, 1980. The employment injury was compound fractures of middle shaft (1) tibia and fibula. Since the date of accident was prior to the amendment of Section 4 as noted above, in my view, the ratio laid down by this Court, is also not helpful to the applicant in this case. Though, the learned single Bench of this Court has also stated that incapacity in the case of Sadashiv (supra) was 100% loss in income.

15. It is to be noted that the date of accident in the present case is December 11, 1996. It is apropos to referred to the judgment of the Apex Court in the matter of Oriental Insurance Co. Ltd. v. Khajuni Devi and Ors. reported in, (2003) 3 LLJ 566SC . The Apex Court held that the rights and liability of the parties, are to be ascertained on the date of the accident. Thus, date of accident is important. On the date of accident, Section 4(1)(c)(i) and (ii) of the Act of 1923 was in following terms:

4(1)(c) where permanent partial disablement results from the injury:

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(ii) in the case of an injury not specified in Schedule I, 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;

Explanation I. - Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not no in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries;

Explanation II- In assessing the loss of earning capacity for the purposes of Sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in

Schedule I.

16. Present is the case of Section 4(l)(c)(ii) of Act of 1923. After amendment of Section 4, by amending Act No. 22 of 1984, assessment of loss of earning capacity, in case of non-scheduled injury is to be computed with the assistance of the qualified medical practitioner. The qualified medical practitioner is defined u/s 2(i). Qualified medical practitioner means any person registered under any Central Act, provincial act or an act of the legislature of its state to provide for the maintenance of a register of medical practitioners, or in any area, where no such last mentioned Act is in force, any person declared by the State Government by notification in the official Gazette, to be a qualified medical practitioner for the purposes of this Act.

17. Thus, proved medical evidence, has an importance after the amendment Act No. 22 of 1984, while determining the loss of earning capacity by the learned Commissioner for Workmen's compensation. The principle idea behind this amended Act No. 22 of 1964, can be summarised as the accent is on the medical evidence alongwith other evidence if any adduced by the applicant. If the assessment made by the qualified medical practitioner is not accepted by the employer or by the applicant, it is permissible for the parties, who are affected by such assessment of the medical practitioner to lead independent evidence by way of evidence of another qualified medical practitioner and show that the assessment made by the earlier medical practitioner is not correct. Thus learned Commissioner has been empowered to decide and settle disputes regarding the nature or extent of disablement also. Thus with same analogy, the loss of earning capacity assessed by qualified medical practitioner, if it is disputed, could be settled by the Commissioner. While awarding the compensation u/s 4(l)(c)(ii) of the Act, the learned Commissioner for Workmen's Compensation has to assess the loss of the workman's earning capacity, resulted by the accident and not simply the loss of his physical capacity. The workman sustaining employment injury, at the time of accident, may have been engaged in variety of work/ avocation/service or otherwise. Thus, the permanent total or partial disablement, sustained by the workmen concerned, on account of employment injury and the loss of earning capacity, are two different entities. The learned Commissioner for the Workmen's Compensation, shall not straightway conclude the loss of earning capacity of the workmen concerned, is equal to the percentage of partial or total physical disablement. The Commissioner has to assess the incapacity of the workman concerned with reference to the work or job, the workmen concerned was doing at the time of the accident and for all work which he was capable of performing at the time of the accident, resulting in such disablement.

18. In the matter of Shivlinga (supra) the Full Bench of the Karnataka High Court held that Shivalinga Shivanagowda Patil and Others Vs. Erappa Basappa Bhavihala and Others, :

25. In view of the discussions and for the reasons mentioned above, we answer the reference accordingly. We answer the points referred numberwise, which are

as under:

(i) The Commissioner under the Workmen's Compensation Act cannot assess the loss of earning capacity without the assistance of the assessment made by qualified medical practitioner regarding loss of assessment or in disregard of the assessment of a qualified medical practitioner. But, if the assessment made by the qualified medical practitioner is disputed by any one of the parties, the Commissioner is competent to sit in judgment over the assessment of the qualified medical practitioner and pronounce upon the same if material by way of assessment of another qualified medical practitioner is placed and he is accepting the said assessment having regard to the nature and extent of the disablement and the loss of earning capacity, he can disregard the earlier assessment of the medical practitioner disputed by the parties.

(ii) In the event of neither the workmen nor his employer producing any medical evidence to show the extent of loss of earning capacity resulting from the injury of the former, Section 11 of the Act empowers the Commissioner to get the injured workman examined at any time by a qualified medical practitioner and to assess the nature and extent of disablement as well as the loss of earning capacity on the basis of such assessment to be furnished by the qualified medical practitioner....

I am in respectful agreement with the view taken by the Full Bench of Karnataka High Court.

19. In the case of non scheduled employment injury, resulting in permanent partial disablement, it is normally possible for the workmen, to establish his loss of earning capacity by his prospectus or offers to him in the open labour market. Since, he may be in his old or other employment. In such circumstances, all that the learned Commissioner of Workmen's Compensation has to do, while discharging his judicial function, is to assess the loss of the earning capacity of the applicant in the light of the medical report/opinion as also on the basis of his own assessment of the workman's possibility of employment in the open labour market and other evidence, if any led by the parties. The Commissioner for Workmen's Compensation, while making assessment or determining the compensation, shall also have regard, to the future loss in earning capacity of the workmen concerned. The employment injuries may differ from workman to workman, nature of the accident, and so on. It is not possible to lay down a Strait-jacket formula. However, determination of compensation, in case of scheduled injuries i. e. provided u/s 4(1)(a) and 4(1)(b) of the Act of 1923 is rather made easier. The learned, Commissioner for Workmen's Compensation, however, is not having such arithmetical formula while considering the employment injuries u/s 4(1)(c)(i) and (ii). Thus, the learned Commissioner for Workmen's Compensation, after considering, medical evidence/report of such employment injury and other evidence of the workman concerned, regarding reduction in his earning capacity, has to work out/determine the amount of compensation. The learned Commissioner for Workmen's Compensation,

however, while determining the amount of compensation, shall keep in mind the object of the Act of 1923 to provide social security to the workmen concerned. The orders passed by the learned Commissioner for Workmen's Compensation, should be to advance the object intended to be achieved by the legislature.

20. Now turning to the facts of the case on hand and from oral evidence as noted above, it is clear that qualified medical practitioner and or doctor issuing certificate in favour of the applicant, was not examined before the learned Commissioner for Workmen's Compensation, in the present case. In the absence of such evidence, the order passed by the learned Commissioner, is contrary to the provision laid down u/s 4(I)(c)(ii) and the Act of 1923. Having regard to the facts and circumstances, I am inclined to set aside the order passed by the learned Commissioner for Workmen's Compensation and remand the case, to the learned Commissioner for Workmen's Compensation with further direction to afford an opportunity to the parties to lead evidence on the point of loss of earning capacity. The learned Commissioner also resort to Section 11 of the Act of 1923, if necessary.

21. In the view of the matter, the judgment and order passed by the learned Commissioner for Workmen's Compensation in Application No. 62 of 1997 is quashed and set aside. The case is remanded to the learned Commissioner for Workmen's Compensation/Labour Court at Jalgaon for deciding the same after giving an opportunity to the parties for leading additional evidence on the point of loss in earning capacity. The learned Commissioner, shall decide the said application accordingly.

22. The learned Counsel Mr. Upadhye has pointed out that as an amount of Rs. 50,000/- was deposited by the opponent No. 1 (Insurance Company) in this Court on February 11, 1999. This amount is invested in the bank. Mr. Upadhye has pointed out that earlier Rs. 25,000/- was the amount paid under no fault liability to the workman. The date of accident is December 11, 1996. It is in the evidence of the applicant that there are 7 persons dependent: on the applicant in his family. In this eventuality, I am tend to direct the payment of Rs. 50,000/- along with interest to the applicants immediately.

23. In this view of the matter, I am inclined to direct the Registry of this Court to make payment of an amount of Rs. 50,000/- alongwith interest, if any accrued to the applicant forthwith. The learned Commissioner for Workmen's Compensation shall consider this aspect while determining and directing payment of the amount of compensation. The Registry to send R & P within a period of 3 weeks from today. The learned Commissioner shall decide the case on or before June 30, 2006. By consent of the learned Counsel the parties are directed to appear before the learned Commissioner for Workmen's Compensation, Jalgaon, i.e. Labour Court, Jalgaon on March 1, 2006.

24. First Appeal is partly allowed and disposed of accordingly.