

(2011) 06 KAR CK 0025

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 10149 of 2008

New India Assurance Co. Ltd., Bangalore

APPELLANT

Vs

N. Venkatesh and another

RESPONDENT

Date of Decision : 14-06-2011

Acts Referred:

Motor Vehicles Act, 1988 — Section 2 (1) (1), 4 A (3)

Citation : (2013) 1 ACC 23 : (2012) ACJ 2503 : (2012) 1 RCR(Civil) 747 :
(2012) 2 TAC 920

Hon'ble Judges : A.N. Venugopala Gowda, J

Bench : Single Bench

Advocate : O. Mahesh, for the Appellant; N. Gopal Krishna, for the Respondent

Final Decision : Dismissed

Judgement

A.N. Venugopala Gowda, J.—This appeal is directed against a judgment dated 30.08.2008 of the Commissioner for Workmen Compensation, Sub-Division-5, Bangalore, whereby the compensation of Rs. 4,99,152/- with simple interest at 12% p.a. after 30 days of the accident was allowed and the appellant was directed to deposit the same. The factual background is as follows:

The 1st respondent/claimant was a driver of a lorry bearing registration No. KA-02-6818, which belonged to the 2nd respondent and was insured by the appellant. An accident occurred on 24.05.2006 and the 1st respondent sustained grievous injuries i.e., fracture of both bones of right leg, resulting in amputation above knee. The claim application filed, which was contested, after raising of issues and holding enquiry, was allowed and the compensation as above was directed to be deposited. Feeling aggrieved, the 2nd respondent in the claim petition i.e., the appellant, has filed this appeal.

2. Sri O. Mahesh, learned counsel appearing for the appellant, contended that, the Commissioner has erred in treating the loss of earning capacity as 100%, ignoring the decision in Shivalinga Shivanagowda Patil and Others Vs. Erappa

Basappa Bhavihala and Others, . Learned counsel submitted that, the Commissioner ought to have seen that the physical disability is different from loss of earning capacity and the physical disability in the instant case has not resulted in total loss of earning capacity, since 1st respondent can continue to earn otherwise than as a driver and in the circumstances, the compensation awarded is required to be scaled down. Learned counsel further contended that, awarding of interest after 30 days from the date of accident is contrary to the ratio of law laid down in National Insurance Co. Ltd. v. Mubasir Ahmed, reported in National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another,

3. Sri N. Gopal Krishna, learned counsel, appearing for the 1st respondent/claimant, on the other hand contended that, there is correct appreciation of evidence placed on record by the Commissioner and there being no dispute with regard to the employment, occurrence of the accident, sustaining of personal injuries by the workman resulting in amputation of right leg above knee, the Commissioner is justified in holding that the permanent disability has resulted in loss of 100% earning capacity and in assessing the compensation payable at Rs. 4,99,152/-. Learned counsel submitted that, the injury sustained being a schedule injury, the compensation having not been deposited within 30 days of the accident, in view of the provision under S.4-A(3) of the Act, the order directing payment of interest at 12% after 30 days of the accident is justified. Learned counsel placed reliance on the decisions reported at Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, K. Janardhan Vs. United India Insurance Co. Ltd. and Another, 2010(3) R.C.R. (Civil) 666 : 2010(4) R.A.J. 136 : 2010(3) S.C.T. 359 : AIR 2010 SCW 437 : (AIR 2010 SC 368) and Shri Aleemuddin and Others Vs. The Divisional Manager, New India Assurance Company Limited,

4. In view of the rival contentions and the record, the points for determination are :

1. Whether in the facts and circumstances of the case, the Commissioner is justified in assessing the loss of earning capacity at 100%?

2. Whether the awarding of interest with effect from 30 days of the accident is justified?

5. There is no dispute that the appellant had insured the lorry bearing registration No. KA-02-6818 and the said vehicle, which was driven by the 1st respondent, having met with an accident on 24.05.2006 and the 1st respondent sustaining employment injuries, which resulted in fracture of both bones of right leg and amputation above knee. Ex. P-3 is the wound certificate and Ex. P-4 is the discharge summary. Ex. P-5 is the photograph of the claimant showing the amputation of right leg above the knee. Driving licence is Ex. P-6. In the cross-examination, it has been elicited that, he has come to the Court with an artificial limb and that the driving licence was renewed on 24.06.2008 for the period up to 23.06.2011.

6. Dr. S.U. Shivaprakash, Orthopedic Surgeon, Victoria Hospital, Bangalore, has

deposed that, he has examined the injured on 18.01.2008 and found that there is loss of right lower limb above knee and the patient walking with crutches and tenderness at stump area. He has opined that, there is physical impairment of 80% to the limb, which is permanent and he has opined that, being in the profession of a driver, the functional disability is 100%. He has stated that, with an artificial limb the patient can walk with difficulty.

7. In *Pratap Narain Singh Deo Vs. Srinivas Sabata and Another*, the case pertained to a carpenter, who had suffered an amputation of left arm from the elbow and it was held that, the same amounted to a total disability as the injury was of such a nature that the claimant had been disabled from all work which he was capable of performing at the time of the accident. It has been held as follows :

5. The expression "total disablement" has been defined in Section 2(1)(1) of the Act 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;"

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 1, 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.

8. The said decision was applied in the case of *K. Janardhan (supra)*, wherein the appellant was a driver and as a result of the accident, he suffered serious injuries which resulted in amputation of the right leg up to the knee joint and on an application filed before the Commissioner for Workmen's Compensation, the Commissioner found that on account of amputation of right leg up to the knee, there is 100% loss of earning capacity as a driver and the compensation was determined. In the appeal, the loss of a leg on amputation was held to be 60% and the loss of earning capacity was reduced to 65%, which finding was

questioned before the Apex Court. Applying the ratio of law in the case of Pratap Narain Singh Deo, it was opined that, the injured has suffered 100% disability and incapacity to earn. The appeal was allowed and by setting aside the judgment of the appellate Courts, the order of the Commissioner was restored.

9. In *S. Suresh v. Oriental Insurance Co. Ltd. & another*, AIR 2010 SCW 437, it has been held that :

In our view, the ratio of the said judgment is squarely applicable to the facts at hand. 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 licence under the Motor Vehicles Act".

The case on hand is not different from the one decided by the Apex Court in the decisions noticed supra.

The awarding of interest being in respect of Schedule injury and there being no deposit of compensation by the insured and the insurer within 30 days of the accident, in view of the provision under S. 4-A(3) of the Act, the Commissioner is justified in awarding interest on compensation after 30 days of the accident. The question is squarely covered by the ratio of decision reported in *Shri Aleemuddin and Others Vs. The Divisional Manager, New India Assurance Company Limited*,

In the result, the appeal is devoid of merit and shall stand dismissed.

The amount in deposit be transferred to the Office of the Commissioner for necessary action.

No costs.