

(2004) 04 KAR CK 0038

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 4535 of 1997

New India Assurance Company Limited and Another

APPELLANT

Vs

Subhas

RESPONDENT

Date of Decision : 17-04-2004

Acts Referred:

Workmens Compensation Act, 1923 — Section 10, 19, 2 (1) (m), 22, 4 (1) (b)

Citation : (2005) ACJ 479 : (2004) 5 KarLJ 7 : (2004) 4 KCCR 377 SN

Hon'ble Judges : R.V. Raveendran, J;N.K. Patil, J

Bench : Division Bench

Advocate : S.V. Hegde Mulkhand, for the Appellant; R.S. Sidhapurkar, for the Respondent

Judgement

R.V. Raveendran, J.—Respondent herein was the driver of lorry bearing Registration No. CAM-105 of which second appellant is the owner and first appellant is the insurer. Respondent sustained an employment injury on 4-2-1996 when driving the said lorry. He sustained serious injuries to the right leg (comminuted fracture of middle and lower one-third of right fibula, oblique fracture of midshaft of right tibia, fracture of head of left fibula, fracture of lower pole of right patella and oblique comminuted fracture of distal shaft of second metatarsal).

2. The petitioner filed a claim petition (W.C. No. 4 of 1996) u/s 10 of the Workmen's Compensation Act, 1923 ("Act" for short), praying for award of Rupees Three lakhs as compensation, in respect of the said injuries. In the claim petition the respondent (also referred to as the "workman") averred that he was aged 35 years and was getting a salary of Rs. 2,000/- per month apart from Rs. 25/- per day as batta, at the time of accident. He also stated that he was hospitalised between 4-2-1996 and 11-5-1996 for treatment and was advised further treatment and bed rest for another six months. He contended that he suffered 100% permanent disablement due to the said injuries sustained by him, that he had lost his job, and that he was unable to attend to his normal day-to-

day activities or work nor earn an income.

3. The employer filed objections denying the claim of the workman that he was getting a salary of Rs. 2,000/- plus batta of Rs. 25/- per day. He alleged that workman was paid only Rs. 700/- as salary including batta. The employer did not however dispute or deny the accident or the injuries sustained by the workman. The employer, as also the insurer (first appellant herein), denied that the workman had suffered 100% disability as a result of the injuries sustained by him.

4. The workman filed an application before the Commissioner for Workmen's Compensation (for short, "the Commissioner") to issue summons to Dr. Ravindra R. Shah, who had already treated him, to assess his disability, to produce the Medical case sheets and give evidence. Accordingly summons were issued to the said Qualified Medical Practitioner ("QMP" for short), who examined the workman and issued a certificate dated 18-6-1997 in regard to the injuries and their effect.

5. The workman examined himself as P.W. 1 and the QMP who issued the Medical Certificate as P.W. 2. The employer did not let in any evidence, though he could have clearly established the workman's salary, by producing his records/accounts.

6. Dr. Ravindra R. Shah (P.W. 2) in his evidence listed the injuries sustained by the workman. He stated that the injuries were grievous in nature; that the workman underwent surgery for insertion of 1M nail with interlocking of right tibia and nailing of fibula on 20-2-1996; that he was an in-patient between 4-2-1996 to 11-5-1996 in the Government. Hospital, Gulbarga; that he suffered post-operative skin necrosis which was treated with serial dressing; that he was readmitted as an in-patient from 28-10-1996 to 28-2-1997 to obtain treatment for the continued infection of the operation site; that workman was again admitted to Government General Hospital for the third time in June 1997 and underwent surgery for removal of nail in tibia and removal of pieces of dead bone; that though structurally the limb was salvaged, functionally the limb could not be put to pre-injury status; that the workman has suffered permanent partial physical impairment to the extent of 50% with reference to whole body; and that the workman will not be able to drive any heavy motor vehicle or any kind of vehicle in future. The certificate issue by him on 18-6-1997 (Ex. P. 26) referred to the injuries and treatment and the third surgery undergone in June 1997 and certified as follows:

"He is likely to need treatment for approximately next 4 to 6 months, as the old fracture had failed to unite due to infection. Even on control of infection and union of bone, he is expected to have severe morbidity as there is deep scarring of all activating muscles of ankle and toes of right foot. Considering the injuries of both legs and the present status of the right leg, his permanent partial physical impairment is estimated to be 50% in relation to whole body".

7. After considering the evidence, the Commissioner passed an order dated

8-8-1997 awarding compensation of Rs. 2,49,576.00. The Commissioner determined the income of the workman with reference to the minimum wage notification dated 12-3-1992 (Gazetted on 28-5-1992) issued by the State Government. He took the minimum wage as Rs. 806.50, with corresponding dearness allowance of Rs. 651.60. Even though the minimum wage notification did not provide for payment of any daily batta, having regard to the evidence of the workman, the Commissioner calculated the batta as Rs. 650/- per month (at the rate of Rs. 25/- per day for 26 days in a month). He thus arrived at the monthly wage of the workman as Rs. 2,108.10. Having regard to the ceiling provided in Explanation II to Section 4(1)(b) of the Act, he took the wages as Rs. 2,000/- per month for calculating the compensation. He held that as the workman could not drive any vehicle and as he could not work as a driver as he was doing before the accident, his case should be treated as one of total disablement and assessed the loss of earning capacity as 100%. He calculated the compensation u/s 4(1)(b) of the Act as follows. 60% of wages multiplied by the relevant factor, that is $60/100 \times 2000 \times 207.98 = \text{Rs. } 2,49,576/-$.

8. Feeling aggrieved, the employer and the insurer have filed this appeal. They have urged the following contentions:

(i) In the absence of any acceptable evidence, the Commissioner though justified in taking the monthly wage as minimum wage plus D.A. (Rs. 806.50 and Rs. 651.60) committed an error in treating batta charges (Rs. 625) as part of monthly wages;

(ii) Having regard to the provisions of Section 4 (as substituted with effect from 1-7-1984) of the Act, the Commissioner is bound by the assessment of percentage of disability/loss of earning capacity made by the Qualified Medical Practitioner. When the QMP has certified that the permanent disablement is partial and assessed it to be 50% in relation to the whole body, the matter will be governed by Section 4(1)(c). The Commissioner has no power or authority to hold, by any independent assessment, that the disablement is total or that the loss of earning capacity is 100% or calculate the compensation u/s 4(1)(b). The compensation has to be worked out u/s 4(1)(c) by treating the loss of earning capacity as only 50%.

9. The learned Single Judge who heard the appeal was of the view that batta payable to the workman cannot be treated as a component of monthly wage as the daily batta is paid when the worker goes out of headquarters on duty and not otherwise. Having regard to Rules 498-A and 514 of the Karnataka Civil Services Rules, learned Single Judge felt that batta was in the nature of travelling allowance which could not be included in wages. But, he found that in National Insurance Company Limited, Chitradurga v. Obalesh and Anr. ILR 1999 Kar. 1181 : 1999(2) CCR 908 another learned Single Judge of this Court had held that batta forms part of wages for the purpose of calculation of compensation under the Act. He therefore referred the matter to a Division Bench.

10. On the contentions urged, the following questions arise for consideration;

"(i) Whether daily batta charges is part of wages for the purpose of computing the compensation under the Workmen's Compensation Act, 1923?

(ii) On the facts and circumstances, whether the Commissioner was justified in including a sum of Rs. 650.00 as batta charges, in calculating the monthly wage?

(iii) To what extent the Commissioner is bound by the assessment by the Qualified Medical Practitioner, in regard to permanent loss of earning capacity caused by the injury or in regard to physical disablement?

(iv) Whether "total disablement" and "partial disablement" are to be determined with reference to all work done in connection with the job/employment of such workman immediately prior to the accident or with reference to any and all work in general, which the workman was capable of performing immediately prior to the accident?

(v) Whether the Commissioner was justified in taking the permanent disability as total and the loss of earning capacity as 100% in this case, when the Qualified Medical Practitioner has clearly given evidence that physical disability is 50%?"

Re: Point No, (i). --

11. Section 2(1)(m) of the Act defines "wages" as follows:

" "Wages" includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment".

This definition is one falling under the category of inclusive-cum-exclusive definitions. It includes any privilege or benefit which is capable of being estimated in money. It excludes any travelling allowance, or the value of any travelling concession, or the contribution paid by the employer towards any pension or provident fund, or the sum paid to a workman to cover any special expenses entailed on him by the nature of his employment. Where a definition is both inclusive and exclusive, and the exclusion is limited to certain specified categories, all other categories which are not so excluded, will fall within the inclusive definition. It follows therefore that if daily batta falls under the items excluded, it will have to be excluded from "wages". On the other hand, if daily batta does not fall under the items excluded, then it will form part of "wages".

12. The question whether daily batta is part of "wages" has been the subject-matter of several decisions. We will refer to them briefly.

12.1 In *Saundatti S.B. Vs. Biyamma*, , a Division Bench of this Court held that batta paid to a cleaner was a benefit received by him forming part of wages. In *National Insurance Company Limited's case*, supra, a learned Single Judge of

this Court held that "batta" is part of "wages" as defined in the Act, as it is a benefit to the employee.

12.2 In *United India Fire and General Insurance Company Limited v. Vadivatha*, 1982 TAG 43 (Mad.), the Madras High Court held that in the absence of clear evidence to show that batta paid represented travelling allowance or the value of any travelling concession, there was no justification for excluding the batta, from wages. The Orissa High Court in *Divisional Manager, Oriental Insurance Co. Ltd. Vs. Giriwal Transport Corpn. and Others*, and the Andhra Pradesh High Court in *New India Assurance Co. Ltd. Vs. Kotam Appa Rao and Another*, have also taken the view that batta paid to a workman falls within the ambit of "wages" as defined u/s 2(1)(m) of the Act.

12.3 A Division Bench of Kerala High Court in *Ouseph Mathai v. Mathew* 1981 ACJ 8 (Ker.) : 1980 I LLJ 494 (Ker.), held:

"That a part of the remuneration due to a worker was being paid daily and the remaining on monthly basis will not make either of the payments any-the-less wages so long as it is a benefit capable of being estimated in money. The question in each case is whether the workman concerned can claim the amount as of right for the services rendered by him. If he can do so and if it does not fall under the excluded category mentioned in Section 2(1)(m), there is no scope for dispute that it is wages which should be taken into account in deciding the quantum of compensation due to the workman".

12.4 In *K.S.R.T.C. and Anr. v. Sundari and Anr.* 1981(2) Kar. L.J. 349 (DB) a Division Bench of this Court held that line allowance and night cut allowance paid by KSRTC to its drivers, was a privilege or benefit which is capable of being estimated in money and therefore a part of "wages" u/s 2(1)(m). In *Hindustan Aeronautics Limited v. Bone John and Anr.* 1971(1) Mys. L.J. 299 :1971 ACJ 266 (Mys.) a Division Bench of this Court held that outstation allowance is the benefit which the employee is entitled to get for working outstation and has nothing to do with nature of employment. The Court also held that Act being an ameliorative legislation, even if there is any doubt, it must be resolved in favour of the workman.

12.5 However, in *New India Assurance Co. Limited Vs. Parvathi and Others*, a Single Judge of this Court, has held that daily batta does not form part of wages as defined u/s 2(1)(m) of the Act, as it is in the nature of a special expense entailed on the workman, by the nature of his employment. It was held that daily batta means an allowance beyond settled rate of pay given on occasions of extraordinary service, or as an extra allowance. The earlier decisions of this Court were not brought to the notice of the learned Single Judge.

13. If any allowance is paid in consideration of the work done by the workman, even if it is paid daily to facilitate the employee to meet his daily needs, it will be a part of the "wage". Similarly, if any allowance is paid to an employee by the employer to meet any special needs or circumstances (relating to his

employment) that will also be part of the "wages". This is because definition of "wage" is an inclusive definition which includes any privilege or benefit which is capable of being estimated in money except those enumerated in the definition itself. It is also significant to note that the term "benefit" is included in the definition of wages under the WC Act, while it is not included in the definition of "wages" under the Payment of Wages Act. However any allowance paid to a workman can be excluded from "wages" for purposes of the Act, if it is established that such payment was (a) travelling allowance; or (b) value of travelling concession; or (c) contribution towards pension or provident fund; or (d) amount paid to a workman to cover any special expenses entailed on him by the nature of his employment. As daily batta paid to a driver does not fall under any of those exceptions, it will necessarily be a part of "monthly wages" for purposes of the Act.

14. It is contended by the appellants, that insofar as drivers and cleaners/conductors are concerned, daily batta is paid only when they go on line i.e., when they travel in the lorry/bus from the Headquarters to any destination and back and therefore, it should be considered as travelling allowance. Normally when an employee with a fixed place of work is sent out, an allowance paid to him may relate to two distinct matters: (i) cost of travelling; and (ii) expenses incurred for boarding, lodging and incidentals outside the workplace. Drivers and cleaners/conductors employed in a lorry or bus do not work in any "fixed place" but are always travelling. In the case of a driver or cleaner/conductor of a lorry/bus, the question of paying any cost of travelling by way travelling allowance does not arise because the driver is driving the lorry/bus and cleaner/conductor is travelling free in the vehicle in connection with his employment and they do not incur any expenditure nor spend money for actual travelling. Therefore, any allowance paid to a driver or cleaner of the lorry when they go out, is an outstation allowance or an allowance paid to meet the expenses for food or lodging or other incidental expenses. Therefore, any batta paid to a driver and cleaner is not travelling allowance, but an allowance given as a "benefit" which will necessarily fall within the definition of "wage".

15. The appellants next contended that as the driver travels from place to place, having regard to the nature of his employment, batta paid to a driver "is a sum paid to the workman to cover any special expenses entailed on him by the nature of his employment". Batta is nothing but a subsistence allowance when staying away from his home or Headquarters. It is paid not only to drivers, cleaners and conductors, but to other employees also, who travel outside the headquarters, either at batta or as outstation allowance. Batta charges is not a payment made to the drivers to cover any special expenses entailed on him by the nature of his employment.

16. In view of the above, subject to evidence to the contrary in any given case, any allowance paid as "batta" to a driver or cleaner of a lorry/vehicle will have to be treated as "benefit" forming part of "wages" under the Act.

Re: Point No. (ii).--

17. The workman has stated in the claim petition and in his evidence that in addition to salary, he was being paid Rs. 25.00 per day as batta. The payment of batta was denied by the employer in his statement of objections. The employer did not however let in any evidence to show that no batta charges was paid. In fact the employer will have records to show the payment of wages made to workman. As the employer failed to step into the witness-box and deny that the driver was paid Rs. 25.00 per day as batta and failed to produce any document to show the actual amount paid as wages, the Commissioner is justified in accepting the claim of the workman that he was being paid Rs. 25.00 as batta and adding Rs. 650/- as batta charges to the monthly wages.

Re: Point No. (iii).--

18. In this case the Qualified Medical Practitioner (P.W. 2) has stated thus in his evidence: "Though structurally the limb has been salvaged, functionally the limb cannot be put to pre-injury use status and hence his permanent partial physical impairment is estimated to be 5% in relation to whole body. The patient Sri Subash will not be able to drive the Heavy Motor Vehicle or any kind of vehicle in future". He has also given a Medical Certificate dated 18-6-1997 (Ex. P. 26) to that effect. The workman has stated, both in his application and evidence, that he has suffered 100% permanent disablement due to the injuries sustained in the accident. The Commissioner has held that the workman has suffered permanent total disablement from the injury and assessed the loss of earning capacity as 100% and calculated the compensation on that basis u/s 4(1)(b) of the Act.

19. Appellants contend that the workman has suffered only permanent partial disablement as a result of the injuries which is certified as 50% by the Qualified Medical Practitioner and therefore the loss of earning capacity should be taken as 50% and compensation should be calculated on that basis, u/s 4(1)(c)(ii) of the Act. It is contended that the decision of the Commissioner holding that loss of earning capacity is 100%, amounts to disagreeing with the assessment by the QMP, which according to appellants is impermissible having regard to Section 4(1)(c)(ii). The appellants contend that in all claims for compensation under the Act, the Commissioner is bound to accept the percentage of physical disability or loss of earning capacity assessed by the QMP and the Commissioner cannot ignore the assessment by the QMP and embark upon an independent assessment of the loss of earning capacity. It is further submitted that the Legislature inserted the words "(as assessed by the Qualified Medical Practitioner)" in Section 4(1)(c)(ii) by Act 22 of 1984, to eliminate arbitrary or independent assessment by the Commissioners leading to award of exorbitant compensation.

20. The workman, on the other hand, pointed out that the percentage of loss of earning capacity is different from the percentage of physical disability and that the QMP has clearly stated that he could not drive any kind of vehicle. In other

words, according to the workman, it should be inferred from the QMP's evidence that while his physical disability was 50% his loss of earning capacity is 100%. Alternatively, it is contended that if the evidence of QMP is to construed as certifying that his loss of earning capacity is only 50% (equivalent to the percentage of physical disability) then it should be held that the Commissioner is not bound by the percentage of loss of earning capacity assessed by QMP. It is submitted that the assessment by the QMP is only one of the several pieces of evidence that is available to the Commissioner and the Commissioner could determine the loss of earning capacity at a higher percentage than what was certified by the QMP with reference to other evidence on record.

21. The questions that therefore arise for consideration are: to what extent and in what circumstances, the Commissioner is bound by the assessment by the QMP and what is the scope of the Commissioner's power in determining the loss of earning capacity? This leads to several other questions. Is the Commissioner a mere rubber stamp who should accept the assessment made by the QMP without examining the correctness of such assessment, even when it is disputed by one of the parties? Whether the Commissioner has no discretion even when he finds that the description of the injury or the percentage of physical disability or the percentage of loss of earning capacity certified by the Qualified Medical Practitioner is ex facie erroneous? Should the Commissioner assume that the percentage of loss of earning capacity is the same as the percentage of physical disability instead of independently calculating the percentage of loss of earning capacity, even where the QMP gives only the percentage of physical disability and does not mention the percentage of loss of earning capacity? Whether loss of earning capacity as assessed by the QMP is relevant and binding only if the injuries have resulted in permanent partial disablement as the words "as assessed by the Qualified Medical Practitioner*" are inserted only in Section 4(1)(c)(ii) dealing with partial disablement and not in Section 4(1)(b) dealing with permanent total disablement?

22. These questions are now answered by a Full Bench of this Court in Shivalinga Shivanagowda Patil and Others Vs. Erappa Basappa Bhavihala and Others, The Full Bench has answered the following questions in this behalf;

QUESTION

DECISION

(i) Whether the Commissioner under the Workmen's Compensation. Act can assess the loss of earning capacity without or in disregard of the assessment of a qualified medical practitioner?

(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) What is the procedure to be followed by the Commissioner for determining the compensation payable to the workmen in cases where neither the workman nor his employer has produced any medical evidence to show the extent of loss of earning capacity resulting from the injury sustained by the former?

(ii) In the event of neither the workman 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.

(iv) Whether the Commissioner can while determining the amount of compensation, award a compensation u/s 4(1)(b) of the Act for an injury that falls u/s 4(1)(c)(i) read with Part II of Schedule I to the Act?

(iv) In the case of any injury specified in Part II of Schedule I which falls u/s 4(1)(c)(i) read with Part II of Schedule I, the Commissioner has the power to determine the amount of compensation awardable u/s 4(1)(b) of the Act provided the injured by adducing independent and acceptable evidence establishes the case that the injury which he has sustained results in a permanent total disablement and not merely permanent partial disablement.

The reasoning given by the Full Bench to reach the said conclusions are also relevant. The Full Bench stated:

"Though the Commissioner could have assessed the loss of earning capacity on the basis of the medical report to be submitted by the Medical Practitioner, the Legislature in its wisdom thought it fit that if a Commissioner, could assess the loss of earning capacity on the basis of Schedule I, a duly qualified doctor could also do the same. Therefore, as the employer has to pay compensation even in respect of injuries sustained which are not mentioned in Schedule I immediately after the accident the Legislature thought it fit to confer on the medical practitioner the power to assess the loss of earning capacity also as that would serve the purpose of the Act better. If the employer accepts the assessment made by the qualified medical practitioner in respect of the loss of earning capacity and pays the compensation the matter ends there. Such assessment is valid and legal and payment made on the basis of such assessment is also legal and valid and the object with which the Act was passed is fully achieved.

The problem arises when the assessment made by the qualified medical practitioner is not accepted by the employer and when he declines to make the payment on that basis. In a case, even the injured may not accept the assessment made by the qualified medical practitioner. It is possible that a qualified medical practitioner could assess the loss of earning capacity contrary to the guidelines prescribed in Schedule I. In all such cases, it is open to the parties who are affected by such assessment of the medical practitioner not to accept his assessment and lead independent evidence by way of evidence of another medical practitioner and show that the assessment made by the earlier medical practitioner is not correct.

Therefore, even in cases of injuries which are stipulated in Schedule I, if the nature or extent of disablement is disputed, the Commissioner shall settle the said dispute after holding an enquiry as prescribed under law. Similarly, if the Commissioner is competent to settle disputes regarding nature or extent of disablement which purely falls within the province of medical evidence certainly the loss of earning capacity assessed by a medical practitioner if it is disputed also could be settled by the Commissioner. In settling the dispute the Commissioner cannot completely ignore the assessment made by the medical practitioner. If the said assessment is disputed, the Commissioner has to find out whether the nature and extent of disablement assessed by the medical practitioner is just and proper; find out whether the medical practitioner has taken into consideration the percentage of loss of earning capacity in relation to which injuries specified in Schedule I as mandated by Explanation II to Section 4(1)(c)(ii) and then come to the conclusion whether the assessment made by the qualified medical practitioner is to be accepted or not. It is also open to him to have a second opinion from a qualified medical practitioner. If the parties themselves adduce evidence of a qualified medical practitioner regarding the extent and nature of disablement suffered and of the loss of earning capacity, that ought to be taken note of by the Commissioner while settling the dispute between the parties regarding the loss of earning capacity. Under the circumstances, it cannot be said that the assessment made by the qualified medical practitioner is final and sacrosanct. The same can be assailed by either of the parties, In other words, (the contention) the Commissioner is bound to give effect to the said assessment and has no right to sit in judgment over the assessment so made by the qualified medical practitioner, is not acceptable.

Under the scheme of the Act, the Commissioner is discharging a judicial function insofar as settlement of disputes are concerned. That is why the law declares that he shall be a Civil Court for the purpose of settling the disputes and the Civil Court's jurisdiction is ousted. Issues are to be framed, judgment has to be rendered answering each issue raised in the case. Therefore, it is clear that the assessment made by a qualified medical practitioner is only in the nature of an expert evidence given to aid the Commissioner to determine the amount of compensation payable which the Commissioner is bound to take note of. As stated, if the correctness or validity of the said assessment is disputed by either

of the parties, he is bound to pronounce his decision on the same which includes not agreeing with the assessment made by the qualified medical practitioner if the evidence on record otherwise supports such a contention or for any good reason".

The appellant contend that in this case, the QMP who gave the certificate and has examined as P.W. 2 has clearly stated that the impairment is 50% and in the absence of any other medical evidence, the Commissioner could not have assessed the loss of earning capacity as 100%. It is pointed out that Commissioner did not choose to refer the workman to another QMP for assessment.

23. We are of the view that the Full Bench's decision fully answers the issue. However, in view of the contention the Full Bench does not deal with a situation where the QMP assesses only the physical disability and not the loss of earning capacity, we will deal with the matter in greater detail. We will first refer to the relevant statutory provisions:

23.1 Chapter II deals with Workmen's Compensation. Section 3 provides that if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of Chapter II. Section 4 provides as to how compensation should be determined in the following cases, where the injuries have resulted in: (i) death; (ii) permanent total disablement; (iii) permanent partial disablement, specified in Part II of Schedule I to the Act; (iv) permanent partial disablement not specified in Schedule I to the Act; and (v) temporary disablement. Relevant provisions of Section 4 are extracted below:

"4. Amount of compensation,--(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely.--

(a) xxx xxx xxx

(b) Where permanent total disablement results from the injury

an amount equal to sixty per cent of the monthly wages of the injured workman multiplied by the relevant factor; or an amount of sixty thousand rupees, whichever is more.

XXX XXX XXX

(c) Where a 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.

XXX XXX XXX

(d) Where temporary disablement, whether total or partial results from the injury. a half monthly payment of the sum equivalent to twenty-five per cent of monthly wages of the workman, to be paid in accordance with the provisions of sub-section (2).

[Note.--The words "(as assessed by the qualified medical practitioner)" were inserted in Section 4(1)(c)(ii) by Act 22 of 1984].

23-2 The Act defines the terms "partial disablement" and "total disablement". They are:

"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;

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".

23.3 The terms "permanent disablement" and "temporary disablement" are not defined. Disablement, in the context, refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human being. "Temporary disablement" refers to disability during the period of treatment and/or recuperation. "Permanent disability*" refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment/recuperation (after achieving the maximum attainable improvement or recovery by treatment/recuperation) which would remain forever without any marked change in the future.

23.4 The term "loss of earning capacity" is also not defined. It refers to the "economic disability" as a result of a physical disability. The percentage of economic disability arising from a physical disability may vary with reference to the nature of employment before the injury. We may illustrate the difference with reference to a person losing his left hand in an accident. If he was a manual

Labourer (say a loader who has to lift and carry goods), he will no longer be able to function as a loader and his income from such job would become nil after the accident. On the other hand, if he was a clerk in Government service (say doing a desk job), even after the accident it may be possible for him to continue in his employment without any loss of income. Therefore, the same physical disability may lead to a 100% loss of earning capacity in the case of a blue collar worker and may not result in any economic disability at all in the case of a white collar employee. Dealing with a case relating to a motor accident claim, a Division Bench of Gujarat High Court in A.S. Sharma Vs. Union of India (UOI) and Another, observed thus:

"Assessment of damages in case of personal injury must be made on the basis as to what is the resultant impact and effect on the earnings or the capacity to earn. It is not entirely right to always make the future loss of income coextensive with the extent of permanent disability. It is not an algebraic or mathematical formula which can be applied anywhere regardless of the avocation or profession or business of the injured claimant, It is a problem which has to be approached from the point of view as to what is the resultant effect on the actual earnings or on the earning capacity. ... On the basis of the evidence as to the permanent disablement, whether complete or partial, the assessment has to be made as to what effects the said disability would have on the entire functioning of the body and how it would consequently affect the earnings or the capacity to earn".

23.5 Determination of loss of earning capacity requires to be done in two stages:

- (i) Assessment of physical disability: which involves ascertainment of the injuries sustained and its impact on the functioning of the human body;
- (ii) Assessment of loss of earning capacity: which involves ascertainment of the job skills and experience possessed by the workman as also the nature and character of the employment of the workman at the time of the accident resulting in such injuries and then assessing the impact of such physical disability on his capacity or ability to discharge the duties/functions relating to such avocation/employment and all work which he was capable of performing at the time of the accident.

Traditionally the first part is the function of the Medical Practitioner. The Legislature, by Act 22 of 1984, has however, in its wisdom, amended Section 4(1) (c)(ii) by inserting words "(as assessed by the qualified medical practitioner)" after the words "as is proportionate to the loss of earning capacity". As a result of the amendment, the QMP is required to assess not only the percentage of physical disability, but also assess the percentage of loss of earning capacity based on the physical disability.

24. We may next refer to the three divisions of disabilities u/s 4 (that is, permanent total disablement, permanent partial disablement and temporary disablement). Temporary disablement is dealt with in Section 4(J)(d) and needs no elaboration, as irrespective of whether such disablement is total or partial, the

compensation is the same as per the formula specified. The other two types of disablement require a little more elaboration.

24.1 Permanent total disablement.--Clause (b) of Sub-section (1) of Section 4 deals with determination of compensation in cases of permanent total disablement resulting from employment injury. What is to be determined u/s 4(1) (b) is whether the injuries suffered by the workman have in fact resulted in permanent total disablement or not. There is no need to decide the percentage of loss of earning capacity as a consequence of such permanent total disablement. It is assumed that the loss of earning capacity is 100% when there is permanent total disablement. If the injury sustained is one among those enumerated in Part I of Schedule I to the Act, the Act deems that it has resulted in permanent total disablement, even without any medical assessment to that effect. Where the injury is one which is not enumerated in Part I of Schedule I, and there is a dispute as to whether the workman has suffered permanent total disablement as a result of the injury, the Commissioner has the jurisdiction to decide such dispute u/s 19 of the Act. Clause (b) of Section 4(1) does not contemplate any assessment by a QMP where the workman has suffered permanent total disablement. But, in cases where the injuries do not fall under Schedule I to the Act, if the workman claims that the injuries have resulted in permanent total disablement, the question whether the disablement is a permanent total disablement or not is basically a matter for medical assessment by a QMP. In cases which do not fall under Schedule I to the Act, any decision by the Commissioner, who is not a medical expert, as to whether the workman had suffered permanent total disablement or not will necessarily have to depend on the evidence/expert opinion of a QMP. The Commissioner has however the discretion either (i) to act on the assessment by the QMP; or (ii) to refer the workman to an independent QMP for examination and assessment of disability if he is not satisfied with the assessment by the QMP relied on either party; or (iii) to consider the evidence of the workman about the nature of his employment and the functions he was performing in connection with his job, prior to the accident, and by correlating such evidence "each the nature of injuries, the nature of physical disability resulting therefrom and the loss of earning capacity as certified or stated by a QMP, decide whether the injuries have resulted in a permanent total disablement or only a permanent partial disablement.

24.2 Permanent partial disablement.--Clause (c) of Section 4(1) deals with determination of compensation in cases of permanent partial disablement. Recourse to Section 4(1)(c) is warranted either when the workman claims compensation alleging that employment injury has resulted in permanent partial disablement or when the Commissioner does not accept a claim of permanent total disablement and decides that the disablement is only partial. Clause (c) makes a distinction between the extent of physical disability and the extent of loss of earning capacity. In the case of permanent partial disablement, the compensation depends not on the extent of permanent partial disablement, but on the loss of earning capacity resulting from such permanent partial

disablement. Where the injuries resulting in the permanent partial disablement are those specified in Part II of Schedule I, then the percentage of loss of earning capacity is as specified in the said schedule. But, it is open to the workman, to establish by evidence, a higher percentage of loss of earning capacity, than what is specified in the said schedule. If the permanent partial disablement has arisen from injuries which are not specified in Part II of Schedule I, then the percentage of loss of earning capacity resulting therefrom has to be determined by the Commissioner on the basis of the assessment made by the QMP.

25. The determination of compensation u/s 4 is standardised and structured. The formulae given in the section use three inputs namely, Monthly wages, Relevant Factor and Percentage of loss of earning capacity, to determine the compensation. How each of these inputs is to be determined is also provided in the Act, as follows:

(a) Relevant Factor,--Ascertained from the statutory table (Schedule IV to the Act) with reference to the age of the deceased/injured workman. (This is some what akin to the "multiplier" adopted in motor accident claims). The age, that is "completed years of age on the last birthday of the workman immediately preceding the date on which the compensation fell due" is ascertainable from the service record of the workman failing which from the S.S.L.C. Certificate or Birth Certificate.

(b) Monthly wages.--This is to be determined as provided in Section 5. Here again the material will be available in the form of last wage slip before the date of accident or service Record or pay register maintained by the Employer,

(c) Percentage of loss of earning capacity.--Schedule I to the Act contains a list of injuries deemed to result in permanent total disablement (Part I) and the list of injuries which result in permanent partial disablement (Part II) and the corresponding percentage of loss of earning capacity. Where the injury resulting in the permanent total or partial disablement is one that is enumerated in Schedule I, percentage of loss of earning capacity is as specified in the Schedule I to the Act. Where the injury is a non-scheduled injury, then the loss of earning capacity shall have to be assessed by the qualified medical practitioner with reference to the permanent disablement suffered by the workman as a result of the injury.

26. Only two inputs are required for determination of compensation in the case of death, that is, the "monthly wages" and the "relevant factor". The compensation payable is 50% of monthly wages multiplied by relevant factor. In the case of permanent total disablement (where the loss of earning capacity is taken as 100%) compensation is 60% of monthly wages multiplied by relevant factor. In the case of permanent partial disablement, the compensation is such percentage (equal to the percentage of loss of earning capacity caused by the injury) of the amount calculated as compensation in the case of permanent total disablement. If "Z" is the percentage of loss of earning capacity, the

compensation payable in the case of permanent partial disability will be $Z/100 \times [60/100] \times (\text{monthly wage}) \times (\text{relevant factor})$. In the case of scheduled injuries, the percentage of loss of earning capacity is as provided in the first schedule. In the case of non-scheduled injury resulting in the permanent partial disablement, the percentage of loss of earning capacity is as assessed by the qualified medical practitioner.

27. Under the scheme of the Act when a workman is injured or dies in an accident arising out of and in the course of the employment, the employer is required calculate and pay the compensation as provided in Section 4. The formulae in Section 4 and the contents of Schedules I and IV are intended to enable the employer to calculate and pay the compensation, to avoid delays in the receipt of benefit to the workman or his family. The employer is required to reach an agreement with the workman in regard to the compensation payable as per Section 4 and file a memorandum of such agreement with the Commissioner. The Commissioner is required to examine it and after satisfying himself about its genuineness and about the adequacy of compensation, record it in a Register as per Section 28. If it appears to the Commissioner that the agreement has been obtained by fraud, undue influence or improper means or that the compensation is inadequate, he may refuse to record the memorandum and make an appropriate order for payment of compensation to the workman as per Section 4. Section 29 provides that if the employer fails to register the agreement as required u/s 28, he shall be liable to pay full compensation as per the provisions of the Act.

28. Section 19 provides for reference to Commissioners in the event of dispute. Sub-section (1) of Section 19 provides that if any question arises in any proceedings under the Act in regard to the following matters, such question shall be settled by a Commissioner, in default of agreement between the parties.--

(i) Liability of any person to pay compensation (including any question as to whether a person injured is or is not a workman); and/or

(ii) Amount or duration of compensation (including any question as to the nature or extent of disablement).

Sub-section (2) of Section 19 bars the jurisdiction of Civil Courts in regard to matters to be dealt with or decided by the Commissioner. Section 22 provides that where an accident occurs in respect of which liability to pay compensation arises under the Act, a claim for such compensation, may be made before the Commissioner. Section 23 provides that the Commissioner shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence on oath, enforcing attendance of witnesses and compelling production of documents and material objects. Section 30 provides for appeals to High Court against the decision of the Commissioner and Section 27 provides for reference of any question of law by the Commissioner for the decision of the High Court. Chapter v of the Workmen's Compensation Rules, 1924 lays down in

detail, the procedure to be followed by the Commissioner is disposal of the claims/cases under the Act. The Commissioner, as a quasi-judicial "Tribunal" constituted under the Act has to settle disputes in accordance with the Act, keeping in mind that the Act is a beneficial legislation intended to provide quick and adequate remedy to workman sustaining employment injuries.

29. The object of Section 4 is to make the determination of compensation easy, quick and uniform and to make the quantum adequate and reasonable. The object of amendment to Section 4(1)(c)(ii) by Act 22 of 1984 is to provide a fair and proper assessment of the loss of earning capacity while calculating the compensation for permanent partial disablement. The appellant's contention that the amendment to Section 4(1)(c)(ii) should be viewed as expression of legislative intent to curb arbitrariness on the part of the Commissioner is without basis. Section 4 is primarily a mechanism for the employer and workman to agree upon the compensation, in a fair and speedy manner. An application to the Commissioner is contemplated only when there is no settlement between the employer and workman. Therefore Section 4 is resorted to in the following two circumstances:

(i) When the employer and the workman reach an agreement as to compensation (without the intervention of the Commissioner), Section 4 provides a standard method for calculation of the compensation (Note.--The agreement when reached is subject to scrutiny by Commissioner u/s 28 and if he finds that the agreed compensation is not adequate, he may pass appropriate order to increase the compensation to bring it in consonance with Section 4).

(ii) When there is a dispute between the employer and workman, either in regard to extent of disability or extent of loss of earning capacity or the quantum of compensation, and a claim is lodged by the workman u/s 2 for compensation, the Commissioner decides the dispute in accordance with Section 4.

30. But, when an application for compensation is filed u/s 22, the Commissioner is required to settle questions relating to nature or extent of disablement and loss of earning capacity as also the quantum of compensation, by exercising the power and jurisdiction u/s 19. Such power necessarily includes the jurisdiction to decide the correctness of the assessment made by the QMP consulted by the workman or by the employer. The contention of the appellants that the Commissioner has no power to decide the extent of loss of earning capacity of the workman, otherwise than as assessed by the QMP, in view of Section 4(1)(c)(ii), if accepted, will result in implied repeal of that part of Section 19 which empowers the Commissioner to decide the extent of disability/loss of earning capacity. The Legislature when amending Section 4(1)(c)(ii) did not amend Section 19. It is deemed to be aware of the existing provisions of Section 19 and further deemed that it did not intend to create any conflict between Sections 4 and 19.

31. Several decisions have considered the question as to how far and in what

manner the Commissioner is bound by the assessment made by the QMP, and the effect of insertion of the words "(as assessed by the qualified medical practitioner)" in Section 4(1)(c)(ii) by Act 22 of 1984. Some have proceeded on the basis that in view of the amendment to Section 4(1)(c)(ii), the Commissioner has no discretion to adopt a different percentage than what is certified by the QMP. Some have held that the Commissioner though bound to take note of the assessment by the QMP, can independently assess the loss of earning capacity with reference to other evidence, particularly in cases where the opinion of the QMP gives only the percentage of physical disability and not the percentage of loss of earning capacity. It is however unnecessary to refer to them, in view of the Full Bench decision in Shivalinga Shivanagowda Patil's case, *supra*.

32. In addition, we may however refer to the Full Bench decision of the Kerala High Court in *New India Assurance Co. Ltd. Vs. Sreedharan*, . referred to and relied on in *Shivalinga Shivanagowda Patil's case*, *supra*:

"But when the statute specifically postulated that the compensation to be awarded should be proportionate to the loss of earning capacity as assessed by the qualified medical practitioner permanently caused by the injury, we cannot obviously overlook the Legislature's intention in accepting and recognising the expert opinion of the medical practitioner. It is only the medical practitioner who can, in the circumstances of the case, assess the loss of earning capacity.... To hold that the Commissioner can disregard it without calling for any other data would be doing violence to the statutory provision. Of course, on the basis of the evidence tendered before the Commissioner, if he finds that the medical certificate issued by the medical practitioner cannot be accepted, he can certainly refer the applicant to Medical Board for expert opinion and report. Without doing so, coming to a decision of his own based on the interested testimony of the applicant would not be justifiable. As it is always open to the Commissioner to send the applicant before a Medical Board, he can very well adopt that method in a case where he finds that the certificate issued by a qualified medical practitioner is found wanting or suffers from any infirmity.

In view of the newly incorporated words "as assessed by the qualified medical practitioner" by virtue of Act 22 of 1984, its importance and significance cannot be overlooked. As the Legislature in its wisdom chose to incorporate the aforesaid words into Section 4(1)(c)(ii), we cannot hold that it has been incorporated with no purpose..... In such a situation the Court is not justified in stultifying comprehensive language used by the Legislature especially when there is no ambiguity..... in the words used in a provision, the Court cannot add or subtract words by its own construction.

In fact the bracketed words were incorporated into the statute obviously with a view to curtail the possibility of the Commissioner arbitrarily determining the compensation. On his whims and fancy the Commissioner cannot determine the compensation under the Act. So long as there is no provision which enables the Commissioner to determine the compensation ignoring the medical practitioner's

report, there is no question of the Commissioner avoiding it unless of course, he wants a second report from the Medical Board.

In a case where there is no such report, it is always open to the party concerned to get such report from the qualified medical practitioner who treated him for the injury sustained by him. It is equally possible for the opposite parties to get a report from the qualified medical practitioner. On a vacuum the Commissioner cannot, by substitution of his own conclusions, decide the compensation amount".

33. The effect of Sections 4 and 19 can be summarised thus:

(a) If the injuries have resulted in a permanent total disablement, the Commissioner shall calculate the compensation as per the formula specified in Section 4(1)(b).

(b) If the injuries have resulted in a permanent partial disablement and such injuries are scheduled injuries (enumerated in Part II of Schedule I to the Act), the Commissioner shall calculate the compensation in accordance with the formula specified in Section 4(1)(c)(i).

(c) If the injuries which have resulted in a permanent partial disablement are non-scheduled injuries (injuries which are not described in Schedule I of the Act) or where the workman contends that the percentage of disablement is more than what is prescribed for a scheduled injury, the Commissioner shall calculate the compensation as per the formula specified in Section 4(1)(c)(ii). The Commissioner, while calculating the compensation shall base the loss of earning capacity on the assessment made by the QMP. But if the assessment by the QMP is disputed by any party, the Commissioner can sit in judgment over the assessment by the QMP, and pronounce upon the same.

(d) If the injuries have resulted in temporary disablement, he shall calculate the compensation as per Section 4(1)(d).

34. We however hasten to add that what we have stated above is not intended to minimise the importance of the assessment by QMP. Nor should we be construed as holding that Commissioner can decide upon questions relating to percentage of disability and loss of earning capacity, without the Benefit of any medical evidence. In all claims relating to injuries, the medical evidence plays the pivotal role and in fact along with documents like Wound certificate, Discharge certificate, Case Sheet and Disability certificate forms the basis for assessment of disability, loss of earning capacity and compensation. Where the assessment by the QMP is bona fide, clear, logical, objective and complete, it can be accepted in toto and acted upon. But difficulties arise in acting upon the assessment by QMPS in the following cases:

(i) Where either party disputes the assessment by the QMP and the Commissioner has reason to doubt the correctness of the assessment by the QMP either on account of ambiguity or lack of objectiveness and bona fides on the part of QMP; or

(ii) Where there are conflicting assessments by two QMPs as in a case where assessment is made by the QMP-Consultant of the workman and the QMP-Consultant of the employer; or

(iii) Where the assessment by the QMP is only in regard to the extent of physical disability and not in regard to "loss of earning capacity".

35. There is no difficulty in accepting the contention of the appellants that the Commissioner has to act on the basis of the assessment of the QMP in ascertaining the extent of disablement and the loss of earning capacity and cannot arbitrarily decide those two matters without reference to a assessment by a QMP. But, what cannot be accepted is the further contention of the appellants that assessment by QMP should be the sole basis and no other evidence should be considered by the Commissioner for assessing whether the workman has suffered permanent disability, and if so whether it is total or partial, and if partial, its extent and effect on earning capacity. Nor can we accept the contention that the adjudicating authority has no power to alter the percentage of disability/loss of earning capacity assessed by the QMP under any circumstances. For valid reasons, the Commissioner has the power to modify the assessment of disability and loss of earning capacity by the QMP relied on by the workman or the employer.

36. We are of the considered view that wherever there is a dispute as to the existence or extent of permanent disablement and loss of earning capacity, or when the Medical evidence produced by one party is disputed by the other, or where the assessment by the QMP is only in respect of the physical disability and not in respect of loss of earning capacity, the Commissioner should refer the workman to an independent Qualified Medical Practitioner (from a panel maintained in the office of the Commissioner) with clear instructions to examine the workman and treatment records (if any) and give his opinion/assessment in regard to the following:

(i) the nature of injuries;

(ii) whether the injuries have resulted in any disability; and if so, whether such disability is total or partial and whether permanent or temporary;

(iii) whether the disability has resulted in any loss of earning capacity if so, the extent of such loss (to be assessed keeping in view the loss of earning capacity listed in Schedule I in regard to various injuries, as Bench marks).

The Commissioner should make available copies of such assessment report by the independent QMP to both parties and record whether both parties accept such assessment. If it is not accepted and marked by consent and if either of the parties has reservations/doubts about the assessment, the QMP should be summoned as a witness and made available for cross-examination. Alternatively, the Commissioner can have resort to Section 20(3) and choose an independent QMP to assist him in the inquiry. Be that as it may.

37. We therefore answer Point (iii) as follows:

(a) The Commissioner's power to decide whether a workman has suffered permanent total disablement or permanent partial disablement, as a result of the injuries, on the basis of evidence let in before him, remains unaffected by amendment to Section 4(1)(c)(ii) by Act 22 of 1984 inserting the words "as assessed by the Qualified Medical Practitioner";

(b) If the Commissioner holds that the workman has suffered permanent total disablement, on account of injuries other than those specified in Part I of Schedule I to the Act, he can proceed on the basis that it has resulted in 100% loss of earning capacity;

(c) Where the Commissioner holds that the workman has suffered permanent partial disablement on account of non-scheduled injuries, the Commissioner should determine the "loss of earning capacity" based on the assessment by a Qualified Medical Practitioner. If the Commissioner is not satisfied about the correctness of the assessment made by a Qualified Medical Practitioner, at the instance of the workman or the employer, the Commissioner may have the workman examined by an independent Qualified Medical Practitioner and act on the assessment by such independent Qualified Medical Practitioner.

Re: Point No. (iv).--

38. The answer to the question as to when there is "total disablement" as contracted from "partial disablement" depends upon the interpretation of Section 2(1)(l) and 2(1)(g). In this context, detailed arguments were addressed on the question whether the extent of disablement should be assessed or judged from the point of view of the job which the workman was doing at the time of accident or from the point of view of all work which he was capable of performing at the time of accident. Several decisions were also cited.

39. In Divisional Manager Ksr Tc. Vs. Bhimaiah, , the said question was considered by Division Bench of this Court. This Court held that:

"The Commissioner approached the question as to the nature of disability resulting from the injury in the present case on the basis that the disablement must be with reference to and vis-a-vis the work Bhimaiah was performing at the time of the accident, viz., that of a driver. That is not what the law contemplates. In General Manager of the Great Indian Peninsular Railway, Bombay v Shankar AIR 1950 Nag. 201 : 1950 LLJ 416 the facts were that a Railway servant working on A-1 post lost one eye and two teeth as a result of a collision between two engines and the Medical Officer declared that the servant was unfit for jobs in Class A-1 and B but fit for Class C-2 because of his defective vision and the job in Class C-2 was offered by the Railway but was not accepted by the servant who claimed compensation on the basis of total disablement. In the said decision, V.R. Sen, J. held as follows:

"But this inability did not imply his inability to do other work. Disablement must

be of such a character that the person concerned is unable to do any work. The reasoning of the learned Commissioner has proceeded as if the words were "for the work which he was performing at the time of the accident" in place of the words which I have underlined for all work which he was capable of performing at the time of the accident".

Examined in the light of this enunciation, with which we are in respectful agreement, the disablement suffered by Bhimaiah did not amount to permanent total disablement because, he is capable of performing duties and executing works other than driving of motor vehicles. Therefore, the Commissioner was not correct in holding that the injury suffered by Bhimaiah amounted to permanent total disablement within the meaning of the "Act" .

The effect of the said decision is that even in a case where the injury sustained by the driver disabled him from functioning as a driver, he will not be considered as having suffered total disability if he could still perform the duties other than driving of motor vehicles and therefore disablement should be considered as partial and the extent of such partial disablement should be assessed by the Commissioner. The decision in Bhimaiah was followed in Nisar Ahmed Abdul Rahiman Killedar Vs. Babulal Achal Singh Raj Purohit and Another, and Syed Abdul Samad And Another Vs. Jabbar Hussain, .

40. In Siddappa Vs. General Manager, KSRTC, another Division Bench of this Court considered a similar question. In that case also, a driver had suffered an injury which incapacitated him from driving. The Commissioner found that the injury was one falling under Part II of Schedule I and accordingly assessed the permanent partial disablement as 60%. The workman contended before this Court that even in regard to an injury suffered by workman specified in Part II of Schedule-I, having regard to the nature of the job in which he was employed, there was permanent total disablement. This Court held that on proving such permanent total disablement, notwithstanding the fact that the injury suffered by a workman is one of those specified in Part II of Schedule I, he would be entitled to the compensation on the basis of total disablement. But, the Division Bench did not notice the decision in Bhimaiah's case, supra.

41. The matter again came up before another Division Bench of this Court in National Insurance Co. Ltd. Vs. Vishnu, , relating to a driver who suffered injury in a motor accident resulting in amputation of left leg below the knee. There was no dispute that workman became totally disabled for continuing in his employment as driver. The said injury was described as Item 20 in Part II of Schedule I for which the percentage of loss of earning capacity to the said injury is specified as 50%. The question that was considered was, whether the workman was entitled to plead and prove that he had suffered a higher percentage of disability or total disability or whether the loss of earning capacity should be restricted to 50% mentioned against Entry 20 in Part II of Schedule I. The Court held that the question as to whether a particular workman had suffered partial disablement or total disablement should depend upon the nature

of employment. It was further held that in respect of cases specified in part II of Schedule I, percentage of loss of earning capacity as specified therein should be accepted and compensation should be awarded on that basis where there was no proof to the contrary, but the workman is not barred from proving that he has suffered a higher percentage of loss of earning capacity. This decision also did not refer to Bhimaiah's case.

42. In R. Vishnu's case, supra, the Division Bench followed the decision of the Supreme Court in Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, which related to a workman who was a carpenter. When doing some work in a cinema hall, he fell down and suffered injuries resulting in the amputation of his left arm from the elbow. The Commissioner held that the loss of left arm had rendered him unfit for the work of carpenter and therefore, adjudged him for having lost 100% of his earning capacity. The appeal against the said decision was rejected by the High Court and was taken up before the Supreme Court by the cinema hall owner. The Supreme Court referred to the contention thus:

"It has not been disputed before us that the injury in question was caused to the respondent by an accident which arose out of and in the course of his employment with the appellant. It is also not in dispute that the injury resulted in amputation of his left arm at the elbow. It has however been argued that the injury did not result in permanent total disablement of the respondent, and that the Commissioner committed a gross error of law in taking that view as there was only partial disablement within the meaning of Section 2(1)(g) of the Act which should have been deemed to have resulted in permanent partial disablement of the nature referred to in Item 3 of Part II of Schedule I of the Act. This argument has been advanced on the ground that the amputation was from 8" from tip of acromion and less than 4 1/2" below tip of olecranon. As will appear, there is no force in this argument".

After referring to the definition of total disablement in Section 2(1)(l), the Supreme Court held:

"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".

Consequently the Supreme Court rejected the appeal. The respondent herein

contended that the decision of the Supreme Court made it clear that if the disablement incapacitated the workman from doing all the work which he was capable of doing at the time of accident i.e., as a carpenter, then he should be held as having suffered total disability. It was further submitted that this interpretation of the term "total disablement" in Section 2(1) of the Act was not noticed by the Division Bench of this Court in Bhimaiah's case, supra.

43. The respondent also relied on a decision of a learned Single Judge of this Court in Hanumantha Gowda Vs. Devaraju, wherein it was held that whether a workman had suffered total disablement or not should be assessed with reference to the work he was carrying on and if the workman is disabled to perform all the work that he was engaged to perform, it amounted to total disablement. The learned Single Judge observed as follows:

"It is to be noted that the compensation is claimed under the Workmen's Compensation Act, 1923 by the worker as defined under the Act. That worker, due to the injury sustained by him, loses the capacity to do that work, which capacity earned him the status of a worker under the employer. If so, the disablement that he suffers should be understood vis-a-vis the work he carried on or for which he was employed. If by the accident, he becomes totally disabled to carry on that work, as far as he is concerned, it is a total disablement. A driver employed is employed to drive. He is not to work as a sweeper or a manual labourer. If due to the accident, a driver becomes incapable of performing his duties as a driver there is total disablement as far as he is concerned. He will cease to be a driver under his employer and consequently a worker under that employer. The fact that he can do some other work elsewhere is no ground to state that he is not totally disabled. His disablement should be assessed with reference to the work he was employed to perform at the time of accident. His capacity to do some other type of work did not earn him the status of worker under the particular employer. If by the accident, the worker loses his employment under his employer, thereby ceases to be a worker as defined under the Act under that particular employer which employment brought him under the purview of the Act and the relationship of employer-worker is brought to an end, then that amounts to the "total disablement" contemplated under the Act. To repeat his capacity to do some other work either under the same employer or another employer or independently is of no consequence. It has to be remembered that a skilled worker, if by an accident is disabled to do the particular skilled work, may not be in a position to be employed as an unskilled worker in the same industry for a variety of reasons".

The learned Single Judge thus categorically held that if the workman becomes incapable of performing duties which he was engaged to perform, there is total disablement as far as workman is concerned and the mere fact that he may be capable of performing some other work was totally irrelevant. The decision in K.P. Hanumantha Gowda's case, supra, was followed by another learned Single Judge of this Court in United India Insurance Co. Ltd. and Another Vs.

Boregowda,

44. In K.P. Hanumantha Gowda's case, supra, the learned Single Judge relied on the decision of the Andhra Pradesh High Court in National Insurance Co. Ltd. Vs. Mohd. Saleem Khan and Another, which in-turn relied on the decision of the Gujarat High Court in Punambhai Khodabhai Parmar Vs. G. Kenel Construction and Another, . The decision in Punambhai's case, supra, related to a truck driver who suffered permanent disability to his right hand which disabled him from working as a driver. Disablement was only partial and not total. The Division Bench of Gujarat High Court held that as the employee was a truck driver and as a result of the permanent disability suffered by him, he could not work as a driver and that it was a case of permanent total disability even it was possible for the said employee to do some other work. In the words of Gujarat High Court:

"In the instant case, the appellant has become incapable to the work of a driver. He cannot do the work of driving with his left arm. Therefore, disablement is total and not partial, as the work of driver cannot be done by him with one armonly".

The decision of the Gujarat High Court was followed by the Andhra Pradesh High Court in Mohd. Saleem Khan's case, supra. This also relates to a driver of truck. The Doctor had held that physical impairment and loss of physical function was 50%. The Commissioner however awarded a compensation on the basis that it was a case of permanent total disablement as he became incapable of driving the vehicle on account of injuries, That was challenged by the insurer before the Andhra Pradesh High Court. It was held that:

"The work which the workmen was capable of performing at the time of accident is material to consider whether it is a case of total disablement or not in view of the injuries sustained in the accident. If the workman is incapacitated to do all the work which he was capable of performing at the time of the accident it is a case of total disablement. It may be that in view of the above injuries the workman is capable enough to render some other sort of work, but still when there is incapacity to do the work which he was capable of performing by the date of the accident it is a case of total disablement".

45. But the matter is now concluded by the decision of the Full Bench in Shivalinga Shivanagowda Patil's case, supra. The Full Bench considered the question "whether the determination of the loss of earning capacity has to be by reference to the work, which the workman was performing at the time of the accident, or by reference to his capacity to do any other work after he has sustained the disability?" and answered as follows:

"Determination of the loss of earning capacity has to be with reference to "all the work" which the workman was capable of performing at the time of the accident resulting in such disablement and not with reference to the work which the workman was performing at the time of the accident. However, this is subject to the condition that in case the workman establishes by acceptable evidence that

after the injury not only he is not able to do the work which he was performing before the accident but he is not able to do any other work, the loss of earning capacity could be assessed on the basis of such evidence".

The reasoning given by the Full Bench to reach the said finding is extracted below:

"Now the words employed in Section 2(1) make it clear that in order to determine the total disablement, whether of a temporary or permanent nature, what is to be seen is whether the injury complained of incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement. Therefore, it is clear the question is not whether the workman is incapacitated to do the work which he was doing before the accident. Even though he was doing a particular work if he was capable of performing other work at that point of time, the question is whether after the accident even though he is disabled from performing the work which he was performing before the accident whether he is able to perform the other work which he was capable of performing before the accident. In that view of the matter, it is not possible to accept the contention that once it is shown that the injured is not capable of doing the work which he was performing before the accident, it amounts to total disablement".

The Full Bench also held that there was no conflict in the views expressed by this Court in Bhimaiah's and Siddappa's cases, *supra*. The Full Bench observed:

"In fact, a reading of the injuries mentioned in Part II of Schedule I, such as injuries like amputation below middle thigh to 8.89 cms. Below knee, amputation below knee with stump exceeding 8.89 cms. not exceeding 12.70 cms., amputation below knee with stump exceeding 12.70 cms., amputation of one foot resulting in end bearing, where the percentage of loss of earning capacity has been held to be only between 50 to 60% clearly shows that the intention of the Legislature was not to treat those injuries as a case of permanent total disablement because in any of those cases any person who was doing his work with the assistance of legs will not be able to do the work thereafter. Therefore, a driver who has to make use of his legs for driving purposes after the said injury will never be able to drive again. If the intention of the Legislature was to treat such injury resulting in permanent total disablement they would not have included these injuries in Part II of Schedule I and declare that the loss of earning capacity on account of the said injury is only between 50 to 60% as against 100%. Therefore, the said provision cannot be construed by Courts in such a fashion which would negate the intention of the Legislature. But, as held in the aforesaid Siddappa's case, *supra*, even if an injury falls within Part II of Schedule I and the injured is entitled to loss of earning as stipulated in the Schedule it is still open to him to lead independent evidence before the Commissioner and contend that on account of the accident he is prevented from doing any work and in a given case if he is able to demonstrate the said fact it is well-within the jurisdiction of the Commissioner to hold that such an injury notwithstanding what

is mentioned in Part II of Schedule I amounts to permanent total disablement and award compensation on the basis of such assessment. As stated earlier, in the aforesaid two Division Bench judgments of this Court, the cases are decided on admitted facts and on facts those judgments are perfectly valid and legal and we do not find any inconsistency between the aforesaid two judgments".

46. On behalf of the workman, it was submitted that though the Full Bench has referred to the decision of the Supreme Court in Pratap Narain Singh Deo's case, *supra*, it has not considered its effect and the decision of the Full Bench may not be fully in consonance with the decision of the Supreme Court. It is submitted that use of the words "all work which he was capable of performing at the time of accident" in Section 2(1)(l) of the Act read in conjunction with the definition of the term "partial disablement" in Section 2(1)(g) and the object of the Act makes it evident that the term refers to all work connected with his job or employment and not with reference to capacity to do work in general. It is contended that if a workman was a driver and on account of the employment injury he is not able to work as a driver at all, then it has to be treated that he has suffered total disablement and not partial disablement. It is farther contended that interpreting the words "all work which he was capable of performing" as referring to something other than the work or job he was doing, may lead to strange results. The following illustrations are given: A driver (who has completed his secondary education) who becomes a paraplegic on account of the injuries sustained may still be able to move around in a wheel chair and be capable of doing some work that could be done with his hands, that is, he may be able to work as a clerk, he may be able to work as a proof reader or he may be able to work as even a packer in a factory. Does it mean that employment injury making him a paraplegic is not total but partial disablement? It is submitted that even blind are employed gainfully nowadays and if capacity to do any work should be the test, there can be no total disablement at all, in any case. Further, it is pointed out that it is impossible to assess what all the work which a workman could have done before the accident, as a person can sit, stand, read or do hundreds of functions theoretically, but in practice, he was carrying out only the functions of his job. It is contended that to examine the extent of disablement not with reference to the job but with reference to all work in general would defeat the very purpose of the Act.

47. When a Full Bench of this Court, after referring to the decision of the Supreme Court, has laid down a legal principle, it is not permissible for us to examine whether the principle laid down by the Full Bench is correct or not correct with reference to the said decision of the Supreme Court. We are bound by the decision of the Full Bench. We therefore answer the question, as per the decision of the Full Bench in Shivalinga Shivanagowda Patil's case, *supra*.

Re: Point No. (v).--

48. Having regard to the decision of the Full Bench in Shivalinga Shivanagowda Patil's case, *supra*, determination of loss of earning capacity has to be with

reference to all the work which workman was capable of performing at the time of accident and not only with reference to the work relating to the job he held at the time of accident. But, the Full Bench has also held that if the workman establishes by acceptable evidence that he is not able to do any work, the loss of earning capacity could be assessed on the basis of such evidence. More importantly the Full Bench did not overrule the decision in Siddappa's case, supra. It has upheld both Bhimaiah's and Siddappa's cases, supra and held the decision depended on the facts of the respective cases dealt therein. Both Bhimaiah's and Siddappa's cases, supra, related to Drivers of KSRTC who on account of employment injuries could no longer drive. While Bhimaiah's held that loss of earning capacity cannot be considered as 100%, Siddappa's held that it was 100%. The Full Bench has noted the relevant difference in the two cases. In Bhimaiah's case, supra, the employer stated that it had no intention to discharge the workman from service and that the workman was being continued in service by protecting his salary as Driver. But, in Siddappa's case, supra, the employer found the workman unfit for work in any class of service in view of the injuries and therefore removed him from service. Therefore the principle evolved by the Full Bench is that if the employer finds the employee suitable enough to do some other work and continues him in employment, obviously it cannot be a case of total disablement, but only a partial disablement. On the other hand, if the workman gives evidence stating that he is not able to do any "work" and that is supported by the fact that the employer terminated his services, instead of fitting him in some other post, it is permissible for the Commissioner to hold that the injury has resulted in total disablement. When the Full Bench observed that the workman should establish that "he is not able to do any other work" the observation is contextual. Termination from employment will be proof enough of workman's claim that he is "not being able to do any other work". The proof that is contemplated is not listing all normal functions of the workman before accident and then establishing that he is not able to discharge each and every one of those functions. The words should not be interpreted literally but in the normal way. When a workman aged about 30 to 40 years employed as a driver, loses the functioning of his legs and is unable to drive and is terminated from employment as not fit for service, it is possible to say that he can always try for employment as a clerk or as a watchman and therefore it is not a case of total disablement.

49. In this case, the workman claimed in his application and also in his evidence, that he has suffered 100% permanent disability due to the injury sustained. The QMP in his certificate dated 18-6-1997 (Ex. P. 26) has stated that the permanent partial physical impairment is estimated as 50% in relation to the whole body. The QMP has also reiterated it in his evidence and stated further that the workman will not be able to drive any kind of vehicle in future. As a result of the injuries the workman has been terminated from employment as he was not fit for any work. The appellant contended that the assessment by the Commissioner at a rate different from the rate assessed by the QMP violates Section 4(1)(c)(ii). We cannot agree. Such a contention might have been available, if the QMP had

assessed the loss of earning capacity as 50%. The estimation of 50% by the doctor is in respect of the physical disablement. The QMP did not assess the loss of earning capacity as 50% but clearly stated that the workman can no longer drive any vehicle.

49-A. Apart the evidence of QMP which makes it clear that the workman will not be able to drive any kind of vehicle, the workman has also stated that in view of the injuries, he is not in a position to do any work. The Full Bench has held that the workman can by evidence establish that he is not capable of doing any work. "Any work" as noticed above, does not refer to the simple acts of walking, moving, bending etc., but refers to capacity to do some job to earn livelihood. The evidence shows that the workman is not capable of doing any job and earn his livelihood. Nothing has been elicited in his evidence to show that he is capable of doing some other work available to him nor has the employer stepped into the witness-box to say that injuries are of such nature that the workman can gainfully be employed to do some other work even though he is not able to drive. In the circumstances, the assessment by the QMP that the workman is not able to drive any kind of vehicle and the evidence of the workman that he is not able to do any work should be construed as evidence clearly demonstrating incapacity to do any work and assessing the loss of earning capacity 100%.

50. Therefore, Commissioner was justified in treating the loss of earning capacity as 100%. On the facts and circumstances and in view of our findings on the points arising for consideration was find no error in the award of the Commissioner. We therefore do not, propose to interfere with the award of the Commissioner. On the facts there is no need to refer the workman to another QMP for assessing the loss of earning capacity. Appeal is accordingly disposed of as having no merit. Parties to bear respective costs.