

(2017) 02 P&H CK 0246

In the Punjab And Haryana At Chandigarh

Case No : C.M. No. 3044 CII of 2012 (O&M) and F.A.O. NO.651 of 2012

New India Assurance Company Limited, Chandigarh

APPELLANT

Vs

Ajay

RESPONDENT

Date of Decision : 22-02-2017

Acts Referred:

Employees Compensation Act, 1923 — Section 4

Citation : (2017) AAC 1112 : (2017) 2 ACC 706

Hon'ble Judges : Augustine George Masih, J.

Bench : Single Bench

Advocate : Mr. Ashwani Talwar, Advocate, for the Appellant; Mr. Pankaj Midha, Advocate, for the Respondent No.1.

Final Decision : Dismissed

Judgement

Augustine George Masih, J.(Oral) - Challenge in this appeal is to the award dated 28.03.2011 passed by the Commissioner under Workmen Compensation Act, Jind, whereby compensation amounting to Rs. 4,05,396/- has been assessed for the disability suffered in road accident by respondent No.1, Ajay, who was a Cleaner on truck, along with simple interest @ 12% per annum from the date of filing of the petition before the Commissioner i.e. 12.06.2008 till the date of passing of the award i.e. 28.03.2011, which comes to Rs. 1,35,807/- to be added in the compensation amount. This total amount of Rs.5,41,203/- was directed to be paid by respondent No.2-Insurance Company within 30 days from the date of communication of the award, failing which 15% interest was to be recovered from the date of award till realization.

2. Briefly, the admitted facts are that respondent No.1, Ajay son of Sheokaran, aged 19 years was working as a Cleaner on a truck bearing registration No.HR-38C-5496 owned and driven by respondent No.2, Ashok Kumar son of Khem Chand. This truck was loaded with potatoes and was coming from Agra to Jind on the intervening night of 16/17.05.2006, when at a distance of 5 K.Ms from Rohtak on Jhajjar side at about 3.00 A.M., a container truck loaded with

motorcycles came from the opposite side and struck on the back side of the body of the truck in which both the respondents were travelling, which resulted in loosing the balance because of which it turned turtle on the left side on the unmattled portion of the road. Since respondent No.1 was sitting on the left side of the truck in the Cabin, being the Cleaner, he suffered serious injuries in the left arm, including elbow. Respondent No.2, Ashok Kumar, Driver-cum-owner of the truck, along with owner of a nearby hotel, shifted him to PGIMS, Rohtak. Since the doctors were on strike, only first aid to Ajay-respondent No.1 was provided and then respondent No.2 shifted and got him admitted to S.K.M. Hospital, Rohtak. He remained admitted there from 17.05.2006 to 21.05.2006, where several operations were conducted on his left arm, which was followed by further visits for his treatment. Oral and documentary evidence was produced by respondent No.1, Ajay, in support of these assertions, which has not been contradicted by the appellant or respondent No.2. It is not in dispute that the truck in question was insured with the appellant.

3. As per the disability certificate, Ex.A1, issued to respondent No.1, Ajay, which has been duly proved by Sh. M.L. Kochar, Orthopedic Surgeon, Deputy C.M.O., General Hospital, Jind, permanent physical disability due to the injuries, including his left elbow, has been assessed as 20%. It has further been stated by the doctor that due to this disability, respondent No.1, Ajay, is unable to lift weight with the left upper limb as he was found to have suffered crush injuries on the left elbow where operation of the fracture of left humerus radius and ulna was observed with stiffness of elbow. The Commissioner has proceeded to grant benefit of 100% disability on the ground that respondent No.1 has suffered 100% functional disability as well as loss of earning capacity for the reason that he could not perform the work of Cleaner any more because of the disability suffered by him in the accident. He has further observed that there is no evidence on the file to indicate that respondent No.1 had capability of performing any other work, except the one being performed by him at the time of accident. In short, it can be said that as respondent No.1, Ajay, is unable to work as a Cleaner, there is total loss of his earning capacity and, thus, entitled to get compensation on this basis.

4. Since the amount of compensation is quite less, this Court, initially was not inclined to interfere. At this, the learned counsel for the appellant contended that a question, which arises in this case and in large number of cases needs to be answered i.e. whether a workman would be entitled to compensation, treating him to be 100% functionally disabled despite the physical disability having been assessed by the doctor to be less, merely because he/she is unable or/and incapable to perform a particular job/work, which was being done/performed by him/her prior and at the time of accident irrespective of the fact that he/she is capable and has capacity to do some other job/work?

5. In the light of the submission of the counsel for the appellant, this Court has proceeded to consider the submission of counsel for the parties on this aspect.

6. Learned counsel for the appellant has placed reliance upon the judgment of Hon'ble Supreme Court in *Palraj v. The Divisional Controller, KSRTC*, 2010 (4) SCC (Civil) 174 to contend that while computing compensation for disability being suffered by workman during his employment, it is the functional disability resulting in loss of earning capacity, which has to be seen and is the criteria to be followed for assessing compensation. Since the doctor in his evidence has stated that with physiotherapy and exercise, the disability suffered by respondent No.1 because of the injury is likely to reduce and he would improve his working capacity. The injury suffered by respondent No.1, would, thus, not fall in Schedule I. It would be an injury, which could be classified as permanent partial disablement, which would fall in Clause (ii) sub section (1) of Section 4 of the Workmen's Compensation Act, 1923 (hereinafter referred to as "the 1923 Act"), which would be proportionate to the loss of earning capacity. The compensation, thus, has to be assessed to the extent and proportionate to the loss of earning capacity, which is permanent, caused by the injury as assessed by a qualified medical practitioner, which has been assessed at 20% disability as per the disability certificate, Exhibit A1 and, thus, he would be entitled to the benefit to that extent only i.e. 20% and not 100% as assessed by the Commissioner vide the impugned award.

7. On the other hand, learned counsel for respondent No.1 submits that the award as has been passed by the Commissioner is in accordance with law. He submits that it has been held in various judgments passed by Hon'ble Supreme Court that where a personal injury is caused to a workman in the course of employment, rendering him incapable of performing his duty in the said capacity on the job on which he was working, the disablement has to be assessed as total, entitling the workman the benefit of 100% disability and accordingly loss of earning capacity. In support of this contention, he has placed reliance upon the judgments of Hon'ble Supreme Court in *Partap Narain Singh Deo v. Shrinivas Sabata and another*, 1976 AIR (SC) 222 and *S.Suresh v. Oriental Insurance Co. Ltd. and another*, 2010 (13) SCC 777. Reliance has also been placed upon the judgment of this Court in *Gurdev Singh v. Indian Red Cross Society, Patiala and another*, 2015 ACJ 75. Reference has also been made to the judgment of Andhra Pradesh High Court reported as *N. Sree Ramulu v. B.Lakshmi Narayana and another*, 2015 ACJ 454.

8. I have considered the submissions made by counsel for the parties and with their assistance have gone through the impugned award as also the pleadings, evidence on record and the judgments referred to above.

9. As regards the judgment in *Palraj's* case (*supra*), on which reliance has been placed by counsel for the appellant, it was a case of Driver, who was working in the Karnataka State Road Transport Corporation. He met with an accident and sustained grievous injuries, which rendered him unfit to be able to drive a vehicle and the disability was assessed at 65% with the functional disability assessed as 20%. The High Court had only granted 20% functional disability primarily on the

ground that the Corporation had appointed him as a Peon and his salary was also protected. The Hon''ble Supreme Court had increased the functional disability to 35% keeping in view the fact that said employee had suffered loss of mobility and would suffer future problem.

10. It would be apparent that the judgments on which reliance has been placed by counsel for respondent No.1 and in particular Pratap Narain Singh Deo's case (supra), which was the case of a Carpenter, who suffered an injury in the course of employment, resulting in amputation of his left hand above elbow, the Larger Bench of Hon''ble Supreme Court held that the work of carpentry cannot be done with one hand and, thus, the disablement was held to be total, entitling him to 100% loss of earning capacity.

11. S.Suresh (supra) was a case where a lorry driver had met with an accident during the course of employment as he lost control of the vehicle, which overturned, resulting in various injuries to him, including the amputation of right leg just below knee. The Court proceeded to rely upon the principles laid down in Pratap Narain Singh Deo's case (supra) and held that on account of amputation of the right leg of the driver below the knee, he has been rendered unfit for the job of Driver, which he was performing at the time of accident, resulting in his disablement. He has lost 100% of his earning capacity as a lorry driver and more so when he is disqualified for even getting a driving licence under the Motor Vehicles Act, 1988.

12. This Court in Gurdev Singh's case (supra) was dealing with a workman, who was a Driver of an ambulance van, which met with an accident during the course of employment, resulting in loss of vision in his right eye. The permanent disability was found to be 30%. The loss of earning capacity was assessed at 100% and moreover he was disqualified for even getting a driving licence for commercial purpose under the Motor Vehicles Act, 1988, which he was earlier having.

13. The above said judgments would show that Hon''ble Supreme Court as well as this Court were dealing with the cases of employees, who were having technical knowledge of their specific field, which required special skill and training. Although in the case of Pratap Narain Singh Deo (supra), it is not clear as to whether the appellant therein possessed any technical certificate or had acquired special qualification for the same, being a Carpenter but in other cases, as the appellants therein were possessing valid driving licences being Drivers, they did have specialised qualifications for performing their duties/job in relation to their employment.

14. In N. Sree Ramulu's case (supra), Andhra Pradesh High Court, after considering the definition of 'total disablement' in Section 2(1)(I) of the 1923 Act, proceeded to decide as to what is total disablement, its effect and assessment of loss of earning capacity, including various factors, which have to be taken into consideration. The principles, which have been culled out from

various judgments of the Hon"ble Supreme Court and other courts are as follows:-

"(a) All injuries or permanent disabilities arising from injuries do not result in loss of earning capacity.

(b) Where permanent partial disablement results from an injury and the said injury is specified in Schedule I, it would be covered by Section 4(1)(c)(i) of the Act. In such a case, the workman would be entitled to such percentage of 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;

(c) Where permanent partial disablement results from an injury and the injury is not specified in Schedule I, it would be covered by Section 4(1)(c)(ii) of the Act. In such a case, the workman would be entitled to such percentage of compensation which would have been 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.

(d) In assessing loss of earning capacity in a case of permanent partial disablement resulting from an injury not specified in the Schedule I, the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I.

(e) The opinion of the medical practitioner as to the percentage of loss of earning capacity would be normally binding on the court where permanent partial disablement results from an injury not specified in Schedule I.

(f) The importance of medical evidence is only in case where disablement in performing duties which the workman was performing earlier cannot be decided without the aid of medical evidence. In case where it can be so decided with or without medical evidence (like amputation of limbs), medical evidence is not relevant and the question of the victim not suffering specified injuries is also not relevant.

(g) Loss of earning capacity is not a substitute for percentage of physical disablement and is only one of the factors taken into account.

(h) The loss of earning capacity arising from a permanent disability may be different from the percentage of permanent disability. Equating the percentage of loss of earning capacity to the percentage of permanent disability would result in the award of either too low or too high a compensation. What requires to be assessed is the effect of permanent disability on the earning capacity of the injured. This involves ascertainment of what activities the claimant can carry on in spite of permanent disability and what he could not do as a result of the permanent disability; ascertainment of his avocation, profession and nature of work before the accident and also his age; and finding out whether he is totally disabled from earning any kind of livelihood (or) whether in spite of permanent

disability, he can still effectively carry on the activities and functions, which he was earlier carrying on (or) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood. In para.13 of *Raj Kumar v. Ajay Kumar*, 2011 ACJ 1 (SC) and in para.7 of *Mohan Soni v. Ram Avtar Tomar*, 2012 ACJ 583 (SC) appropriate guidance is available.

(i) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Commissioner/Court with reference to the evidence in entirety.

(j) Where a claimant is a workman who suffered injuries in an accident and his employer either provides for pension after retiring the workman on the grounds of medical invalidation or the dependents of the claimant are given appointment on compassionate grounds, he has a duty to disclose these facts and they would have a material bearing on the ascertainment of the percentage of loss of earning capacity.

(k) It is a question of fact in each case whether there is permanent total disablement on account of the injuries suffered by the claimant. In a given case, the loss of earning capacity caused by an injury can amount to 100% disablement. But, if the injured claimant is in a position to earn a living by doing a job other than the one which he was doing at the time of his accident, he cannot be said to have suffered 100% disability.

(l) Any scaling down of the compensation should require something more tangible than a hypothetical conjecture that notwithstanding the disability, the victim could make up for the loss of income by changing his vocation or by adopting another means of livelihood. The party advocating for a lower amount of compensation for that reason must plead and show before the Commissioner that the victim enjoyed some legal protection (as in the case of persons covered by the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995) or in case of the vast multitude who earn their livelihood in the unorganized sector by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving a certain income."

15. In view of the above and placing reliance upon principles as have been culled out by the Andhra Pradesh High Court in its judgment in *N.Sree Ramulu* (supra), it is held that loss of earning capacity arising from permanent disability may be different from the percentage of permanent disability and the opinion of the medical practitioner is to the percentage of loss of earning capacity, which would, normally, be accepted by the Court, where permanent partial disability results from an injury not specified in Schedule I and the workman would be entitled to

such percentage of compensation, which would be payable in case of permanent total disability, proportionate to the loss of earning capacity, resulting from the injury. It is a question of fact which has to be determined in each case whether the permanent total disablement on account of injury suffered results in loss of earning capacity and to what extent as it would be dependent upon the employee's position to earn a livelihood by doing the job other than the one which he was doing at the time of accident. If he is able to earn a livelihood by doing some other job, he cannot be said to have suffered loss of 100% earning capacity irrespective of the disability as assessed by the medical practitioner, however, subject to avocation, profession and nature of work being performed by him at the time of accident, where the work being performed by him/her is of skilled/technical nature which emanates from some technical qualification and/or experience, which he/she is unable and incapable of performing after the accident, the compensation should be assessed by giving full weightage and importance than an ordinary or manual nature of work.

The question as raised by the appellant is, thus, answered as above.

16. Present is a case where it has been admitted in the cross-examination by respondent No.1 that he does not possess any certificate/licence of a Cleaner nor is it specialised technical or skilled employment. It is correct that because of the injury, he may not be in a position to get a driving licence under the Motor Vehicles Act, 1988, provided his disability continues as this is an aspect which would depend upon his own act and conduct as the doctor has said in his cross-examination that the disability may reduce to some extent with the passage of time and by way of active exercise and physiotherapy. It has not come on record nor has it been pleaded by respondent No.1 that he would not be able to get a driving licence because of the disability suffered by him in the accident.

17. Although the medical evidence does not indicate with regard to the loss of earning capacity but there is even no evidence on record on behalf of the appellant, which would indicate that respondent No.1 is unable to perform any other work, especially when the work being performed by him is neither purely of a technical nature nor is it of a skilled nature. The evidence, which has come on record in the form of pleadings and statement of respondent No.1, is that he is unable to do any work nor is he working. Rather, he states that the follow up treatment is in progress and further operations would have to be performed. The appellant has failed to challenge this statement in cross-examination and in the absence of any evidence to the contrary, the plea of the counsel for the appellant that respondent No.1 can perform some other work cannot be accepted in this case.

18. In view of the above, the appeal stands dismissed.

19. Since the main appeal stands dismissed, no orders are required to be passed on C.M. No.3044 CII of 2012.