

(2010) 04 MP CK 0072

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 2276 of 2003

Omprakash

APPELLANT

Vs

Raseed Khan and Another

RESPONDENT

Date of Decision : 06-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Workmens Compensation Act, 1923 — Section 10, 4(1)

Citation : (2012) ACJ 384 : (2010) 127 FLR 1023 : (2010) 5 MPHT 129 : (2010) 4 MPJR 15 : (2010) 4 MPLJ 216

Hon'ble Judges : N.K. Mody, J

Bench : Single Bench

Judgement

N.K. Mody, J.

This appeal was admitted for final hearing vide order dated 11-2-2004 and it was observed in the order that no substantial question is required to be framed by the Court.

Being aggrieved by the order dated 11-7-2003 passed by Commissioner for Workmen's Compensation, Labour Court, Indore in Claim Case No. 49/01 whereby the claim petition filed by the Appellant u/s 10 of Workmen's Compensation Act (which shall be referred hereinafter as the Act) was allowed in part and a sum of Rs. 2,16,734/- was awarded as compensation along with interest @ 11% per annum from the date of accident, the present appeal has been filed.

Short facts of the case are that Appellant claimant filed a claim petition u/s 10 of the Workmen's Compensation Act before the Commissioner for Workmen Compensation alleging that on 29-5-2001 Appellant was working as driver on a truck bearing registration No. MP 09 K5966. It was alleged that said truck met with an accident, with the result Appellant sustained injuries in both the legs and also on other parts of the body. It was alleged that Appellant was the employee of Respondent No. 1 and said truck was insured with Respondent No. 2. It was

prayed that compensation be awarded. The claim petition was contested by the Respondent No. 2 on various grounds. After framing of issues and recording of evidence learned Trial Court allowed the claim petition filed by the Appellant and compensation was awarded as stated above, against which the present appeal has been filed.

Cross-objections have also been filed by the Respondent No. 2 on 27-12-2009 along with an application for condonation of delay. The application for condonation of delay is also pending.

Learned Counsel for Appellant submits that impugned order passed by the learned Court below is not correct and deserves to be set aside. It is submitted that income of the Appellant at the relevant time was Rs. 4000/- per month as salary and Rs. 50/- per day as daily wages, thus income of the Appellant was Rs. 5500/- per month. It is submitted that for awarding compensation of Rs. 2,16,734/- learned Court below has taken into consideration the salary as Rs. 4000/- per month and 60% of the salary was taken as Rs. 2400/- and out of that, 47% was taken as permanent disability of the Appellant. Since the age of Appellant was 37 years, therefore, after applying the factor of 192.14 learned Court below has assessed the compensation of Rs. 2,16,734/-. Learned Counsel submits that learned Court below committed error in not taking into consideration the permanent disability as 100%. It is submitted that Appellant who is present in Court is not in a position to discharge his duties as driver as Appellant has sustained fracture of tibia and fibula and femur bone of both legs. It is submitted that in the facts and circumstances of the case learned Court below ought to have taken into consideration permanent disability as 100% for the purpose of awarding compensation. It is submitted that learned Court below also committed error in not taking into consideration the daily allowance @ Rs. 50/- per day. For this contention learned Counsel placed reliance on a decision of Full Bench of Karnataka High Court in the matter of New India Assurance Company Limited and Another Vs. Subhas, wherein Full Bench of Karnataka High Court has observed that Batta paid to a driver has to be treated as benefit forming part of "wages" under the Act. It was further observed that it is not paid to driver to cover any special expenses entailed on him by the nature of his employment; it is an outstation allowance paid to meet the expenses for food or lodging or other incidental expenses; it is not a travelling allowance. It is submitted that in the facts and circumstances the appeal filed by the Appellant be allowed and impugned order passed by the learned Court below be modified by enhancing the amount.

So far as cross-objections are concerned, learned Counsel submits that appeal was admitted on 11-12-2004 while the cross-objections were filed on 27-11-2009. It is submitted that Respondent has made appearance on 1-4-2004 through Counsel and no cross-objections were filed for a period of more than 5 years. It is submitted that reason assigned for delay in filing the cross-objections in time is that no specific question of law was framed by the Court. It is

submitted that this cannot be a ground for condonation of inordinate delay of five years, therefore, cross-objections filed by the Respondent No. 2 cannot be entertained. It is submitted that appeal filed by the Appellant be allowed and cross-objections filed by the Respondent No. 2 be dismissed.

Learned Counsel for Respondent No. 2 submits that the learned Court below committed error in awarding the interest from the date of accident. It is submitted that the learned Court below committed error in assessing the permanent disability up to the extent of 47%, as no doctor was examined on that behalf. For this contention learned Counsel placed reliance on a decision of Hon"ble Apex Court in the matter of Rajesh Kumar @ Raju Vs. Yudhvir Singh and Another, , wherein Hon"ble Apex Court has held that the medical certificate is inadmissible in evidence as the Doctor who issued the certificate was not examined. Further reliance is placed on a decision in the matter of Narayan Chakraborty Vs. Swapan Debnath and Another, wherein Gauhati High Court has held that for claiming compensation under the provisions of Workmen's Compensation Act, 1923 evidence of medical witness is a condition precedent for assessment of disability so as to enable the workman to claim compensation under Workmen's Compensation Act. It is submitted that the cross-objection filed by the Respondent No. 2 be allowed and the impugned order be set aside.

From perusal of the record, it is evident that vide order dated 11 -2-04 this Court observed that appeal is admitted for final hearing and no substantial question of law need to be framed by the Court. For filing the cross-objections in an appeal the Respondent is entitled under Order 41 Rule 22, CPC according to which cross-objection ought to have been filed within 30 days from the date of admission of the appeal. It is true that no substantial question of law was framed by this Court while admitting the appeal, but on that account it cannot be said that the cross-objection filed by the Respondent No. 2 was in time. However, since substantial question of law was not framed, therefore, Respondent No. 2 might have been in confusion that on what question of law appeal shall be heard, therefore, in spite of the fact that there is substantial delay in filing the cross-objection, the delay is condoned subject to cost of Rs. 5,000/-, which shall payable by Respondent No. 2 through cheque in the name of Appellant.

It is true that Appellant has filed the medical certificate to prove the permanent disability, but no doctor has been examined by the Appellant to prove the certificate and also the permanent disability. As per Explanation 2 of Section 4(1) (c)(ii) of Workmen's Compensation Act examination of Doctor who issued the certificate is mandatory for assessment of loss of earning capacity. Non-examination of the Doctor does not satisfy the requirement of law; if the doctor is examined before the Commissioner, the employer/Insurance Company gets an opportunity to cross-examine the doctor and they may get the case of the workman referred to Medical Board.

Appellant himself is present in Court. From his appearance it is evident that Appellant cannot move without help of clutches. Since the doctor has not been

examined and the Appellant is also not satisfied with the disability assessed by the learned Court below, therefore, appeal filed by the Appellant and cross-objection filed by Respondent No. 2 are allowed and the impugned order so far as it relates to extent of permanent disability of the Appellant is concerned, is set aside and the case is remanded back to the learned Court below to give an opportunity to the parties in that regard and redecide the question of entitlement of the Appellant for compensation on account of permanent disability. Parties are directed to remain present before the learned Court below on 15-4-2010.

With the aforesaid observations, appeal stands disposed of. No order as to costs.