

(2019) 05 GAU CK 0052

In the Gauhati High Court

Case No : Miscellaneous First Appeal No. 27 Of 2010

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Md. Zakir Hussain And Anr

RESPONDENT

Date of Decision : 15-05-2019

Acts Referred:

Workman's Compensation Act, 1923 — Section 4(1)(c)(ii), 4(1)(d), 30
Indian Penal Code, 1860 — Section 279, 304(A)

Citation : (2019) 05 GAU CK 0052

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : S. Dutta, A.K. Purkayastha

Final Decision : Allowed

Judgement

1. Heard Mr. S. Dutta, learned senior counsel appearing for the appellant. I have also heard Mr. A.K. Purkayastha, learned counsel appearing for the respondent no.1. None appears for respondent no. 2.

2. This appeal filed under Section 30 of the Workman's Compensation Act, 1923 is directed against the judgement and award dated 03/07/2007 passed by the learned Commissioner, Workman's Compensation, Nagaon, Assam in case No. NWC 156/2005, awarding a sum of Rs. 1,15,328/- along with interest @ 9% per annum on the said amount from the date of accident till realization.

3. The appeal was admitted to be heard on the following substantial questions of law :-

"1. Whether the learned Commissioner can, on the presumption of the registered medical practitioner, accept the disability at 30%?

2. Whether daily allowances, paid to the workman, can form part of his wages in assessing the compensation?

3. Any other question or questions, which may be allowed to be raised by the

appellant at the time of hearing of this appeal?"

4. The facts of the case, in a nutshell, are that the claimant /respondent no.1 in this case was engaged as a labour in Vehicle No. AS-02/B-0825 (Truck) owned by the respondent no.2. On 05/09/2005, when the vehicle was proceeding from Jamunamukh towards Nagaon on the national highway, owing to some mechanical defect, the truck had turned upside down on the road, as a result of which, the claimant claims to have suffered grievous injuries on the head and both the knees besides other parts of the body. The claimant was thereafter, shifted to BPC hospital at Nagaon for treatment and a case being Nagaon PS Case No. 657/2005 was registered under Section 279/304(A) of the IPC.

5. Claiming that the injuries suffered by him had resulted into permanent partial disablement, the respondent no.1/claimant had demanded compensation from his employer i.e. the respondent no.2. However, when the said request was not accepted by the employer, the respondent no. 1/claimant had approached the learned Workman's Compensation Commissioner, Nagaon, Assam, by filing the aforesaid claim petition.

6. During the course of trial, the claimant had examined himself as PW-1 and Dr. Lalit Chanda Nath, the doctor who had treated him, as PW-2.

7. Upon appreciation of the materials available on record, the learned Commissioner was of the view that the claimant had succeeded in establishing his case justifying grant of compensation. Accordingly, by taking the salary of the claimant to be Rs. 3,000/- per month and the loss of earning capacity to be 30%, the learned Commissioner had awarded the sum of Rs. 1,15,328/- as compensation along with 9% interest from the date of the accident, treating the extent of permanent disablement to be 20%.

8. It appears from the record that the principal amount of Rs. 1,15,328/- has already been deposited by the Insurance Company and the said amount has also been disbursed by the learned Commissioner in favour of the claimant on 14/09/2009.

9. Assailing the impugned judgement and award dated 03/07/2007, Mr. Dutta submits that there is no evidence available on record to indicate any permanent disability suffered by the claimant. That apart, submits Mr. Dutta, the testimony of the PW-2 to the effect that the claimant had suffered 30% loss of earning capacity is also without any valid basis. Under the circumstances, the learned senior counsel appearing for the appellant submits that not to speak of awarding interest from the date of accident, the claimant was not entitled to any compensation at all in this case.

10. By placing reliance on the decision of this Court in the case of National Insurance Company Ltd. Vs. Bimal Nath and others reported in 2009(1) GLT 370, Mr. Dutta submits that even assuming that the claimant had suffered any injury resulting into his permanent disability, even then, in the absence of any evidence

brought on record to show that the claimant was incapacitated from taking up every other employment, which he was capable of accepting on the date on which the accident had occurred, no compensation under Section 4(1)(c)(ii) of the Act of 1923, could have been awarded in his favour by the learned Commissioner.

11. Mr. Purkayastha, learned counsel for the respondent no.1/claimant, on the other hand, submits that the claimant had produced medical records, examined the Doctor (PW-2) who had treated him after the accident in support of his claim but the learned counsel fairly submits that there is no basis for the PW-2 to opine that the loss of the earning capacity in this case was to the extent of 30%. The learned counsel for the claimant had also fairly submitted that since the X-ray plate is not available, hence, there no reliable evidence to support the plea of the claimant of having suffered fracture in the legs. Mr. Purkayastha has, however, submitted that even if the award dated 03/07/2007 is set aside by this Court, considering the financial status of the claimant and the long lapse of time in the matter, no recovery be permitted in respect of the amount already disbursed.

12. I have considered the submissions made by the learned counsel for both parties and have gone through the materials available on record.

13. From the testimony of the Doctor (PW-2), it appears that the witness had claimed to have treated the claimant after the accident and has also opined that the permanent disability suffered by the claimant was to the extent of 20% and the loss of earning capacity was 30%. However, from the cross examination of the PW-2, it not only transpires that no X-ray was conducted upon the limbs of the claimant but the Doctor had even opined that the injuries sustained by the claimant had, by that time, healed sufficiently. The claim of the respondent no. 1/claimant of having suffered head injury was also not supported by the Doctor and the said fact has also been taken note of by the learned Commissioner. The medical records produced by the claimant also does not go to show that he had suffered any permanent disability of any degree.

14. Situated thus, it is apparent that there was no evidence available on record to show that the claimant had suffered any injury leading to his permanent disability, even if partial in nature. Notwithstanding the same, merely on the basis of the testimony of PW-2, learned Commissioner has held that the claimant had suffered permanent disability to the extent of 20% leading to the loss of earning capacity of 30%. Since the opinion of the doctor (PW-2) is without any valid basis and is not supported by medical records, I am of the opinion that the learned Commissioner has erred in law by awarding compensation in favour of the claimant solely on the opinion of PW-2. In other words, I am of the view that the learned Commissioner was not correct in holding that the claimant had succeeded in establishing his case by leading oral and documentary evidence when no such evidence was actually available on record.

15. Coming to the next point raised by Mr. Dutta, I find from the record that

there is no plea taken by the respondent no.1/claimant that due to alleged permanent disability suffered by him, the respondent no.1/claimant was unable to accept every other employment, which he was capable of undertaking on the date of the accident. If that be so, in view of the law laid down by this Court in the case of Bimal Nath (Supra), no compensation as per Section 4(1)(c)(ii) of the Act of 1923 could also have been awarded in favour of the claimant. Even if proper evidence was available on record to establish the claim of permanent disability, the amount of compensation that could have been awarded in favour of the claimant in case for loss of earning capacity, at best, could be under Section 4(1)(d) of the Act of 1923, which amount would have been much less than the principal amount awarded by the learned Commissioner and already disbursed to the claimant.

16. For the foregoing reasons, I am of the view that the judgement and award dated 03/07/2007 is vitiated by perversity, the same is accordingly set aside.

17. However, considering the fact that the respondent no.1 is a workman and the principal amount of Rs. 1,15,328/- had been disbursed to him way back in the year 2009 as per order of the learned Commissioner, in order to avoid any hardship to the claimant, it is hereby ordered that no recovery shall be made by the appellant from the respondent no. 1/ claimant in respect of the amount already disbursed to him.

18. With the above observations, the appeal stands allowed. There would be no order as to costs.

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