
(1994) 07 BOM CK 0014
In the Bombay High Court
Case No : F.A. No. 451 of 1990

Regional Director E. S. I. Corporation APPELLANT
Vs
Parasnath Shivbaran and another RESPONDENT

Date of Decision : 29-07-1994

Acts Referred:

Employees State Insurance Act, 1948 — Section 82

Citation : (1997) 3 LLJ 785

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : R.M. Jayakar, instructed by M/s. M.V. Jayakar and Co, for the Appellant; Ms. Meena H. Doshi, for the Respondent

Judgement

1. The Employees" State Insurance Corporation, Bombay has preferred this appeal against order, dated February 9, 1988 passed by the Employees" State Insurance Court at Bombay in Appeal (E.S.I.) No. 3 of 1985 filed by the workman Parasnath Shivbaran u/s 54-A of the Employees" State Insurance Act, 1948.

2. At the relevant time, the Respondent No. 1 was employed as a helper in Colour Mixing Department in Bombay Dyeing and Manufacturing Company Ltd. On March 11, 1981, the Respondent No. 1 met with an accident during the course of his employment as a result whereof his left hand was injured. Due to the said accident, the bones of his left hand thumb got crushed and damaged. A steel wire had to be inserted in his left hand thumb due to which the thumb became stiff. In the proceedings before the Court below it was the case of the workman that the workman had lost total grip of the left hand fingers as a result of the injuries suffered and his chances to get the same job or similar job were substantially reduced. The Respondent No. 1 was got admitted to Mahatma Gandhi Memorial Hospital at Parel. The Respondent No. 1 had to undergo treatment for about 8 months. When Respondent No. 1 approached the Respondent No. 2 to resume his duties, job was denied to Respondent No. 1 on the ground that the Respondent No. 1 could not do any work in view of his left

hand having become practically useless.

3. On or about May 11, 1982, the Medical Board of the Corporation assessed the physical permanent disability of Respondent No. 1 workman at 25%. The Medical Appellate Board revised the decision of the Medical Board and fixed permanent disability of Respondent No. 1 workman to 30%. The Respondent No. 1 used to earn about Rs. 16 per day. In view of the decision of the Medical Appellate Tribunal, the daily amount of permanent disablement benefit was increased from Rs. 3.50 per day to Rs. 4.20 per day. It was the case of the Respondent No. 1 throughout that the Respondent No. 1 had suffered 100% permanent disability in terms of loss of his earning capacity.

4. Being aggrieved by the order of Medical Appellate Tribunal, the Respondent No. 1 preferred Appeal (E.S.I.) No. 3 of 1985 before the Employees' State Insurance Court at Bombay as contemplated u/s 54-A of the Employees' State Insurance Act, 1948. The trial Court recorded the evidence of Respondent No. 1. The trial Court was impressed by the evidence of Respondent No. 1. The trial Court accepted the evidence, of Respondent No. 1. During the course of his evidence, the Respondent No. 1 stated that he could not make use of his left hand fingers for any purpose including tying his dhoti, button his shirt etc. The Respondent No. 1 also stated that he was unable to do his normal duty and he has no other source of income. As far as the right hand is concerned the Respondent No. 1 admitted that his right hand was in perfect working order. The Respondent No. 1 also admitted in his cross examination that the other four fingers of his left hand had their normal movements.

5. After referring to the several judgments of several High Courts as well as the judgment of the Supreme Court in the case of Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, , the trial Court held that the Court was required to assess the loss of earning capacity for purpose of finding the amount of permanent disablement benefit to which the employee was entitled to. The trial Court held that loss of physical capacity in terms of medical terminology was not coextensive with loss of earning capacity. In support of this proposition the trial Court relied on the judgment of the High Court of Calcutta in the case of Sarat Chatterjee and Co. v. Mohd. Khalil, 1979 ACJ 106. The learned Counsel for the Corporation had relied on Part 2 of the Second Schedule appended to the Act and particularly item at Serial Nos. 11 and 12 thereof. After referring to the relevant case law and the provisions of the said Schedule as well as the oral evidence of Respondent No. 1, the trial Court reached the conclusion that the appellant had suffered loss of earning capacity to the extent of 60% though not 100%.

6. Section 82(2) of the Act enables a party aggrieved to prefer an appeal to this Court only if an order of the Employees' Insurance Court involves a substantial question of law. In my opinion, this appeal does not involve any substantial question of law. In my opinion, the order of the trial Court is just, legal and proper.

7. The learned Counsel for the appellant submitted that the trial Court had arbitrarily fixed the loss of earning capacity at 60%. The trial Court arrived at reasonable and fair estimate regarding the loss of earning capacity after properly analysing the evidence on record. I have, therefore, no hesitation in rejecting this submission of the learned Counsel for the appellant.

8. The learned Counsel for the appellant submitted that the Court was mainly concerned with Part II of the Second Schedule appended to the Act. Part II of the 2nd Schedule appended to the Act does fix percentage of loss of earning capacity if there is a loss of thumb or there is loss of thumb and its metacarpal bone with all this, it appears that the trial Court had requisite jurisdiction to fix the percentage of loss of earning capacity in light of the evidence led before the trial Court. In my opinion, the provisions contained in the Second Schedule to the Act did not bar the trial Court from reaching a just and fair conclusion in light of the evidence led in the case. It is true that the judgment of the Supreme Court in the case of Pratap Narain Singh v. Shrinivas Sabata and Another (supra) pertains in the proceeding under the Workmen's Compensation Act, 1923. In my opinion, the principle of the said decision shall have relevance to the present case also. Section 53 of the Act provides that an insured person shall not be entitled to receive compensation or damages under the Workmen's Compensation Act or any other law for the time being in force if he is entitled to the benefits under the Employees' State Insurance Act, 1948 by reason of the workman being an insured person as an employee under the Act.

9. In any event, having regard to the facts of this case, it is not possible to interfere with the conclusions arrived at by the trial Court. It is not a regular first appeal both on facts and on law. No appeal lies to this Court even if the trial Court commits an error of law. The expression "substantial question of law" used in Section 82(2) of the Act is of considerable significance. After taking an overall view of the matter, I am not inclined to interfere with the decision of the trial Court.

10. The learned Counsel for the appellant submitted that the Respondent No. 1 could get some other job and perhaps Respondent No. 2 could be persuaded to offer an alternate employment to Respondent No. 1. I am not impressed by this submission also. Even if the Respondent No. 1 can get the same job somewhere sometime, it does not follow that the appellant is not liable to pay the amount of permanent disablement benefit as directed by the trial Court.

11. In the result, the appeal, fails. The appeal is dismissed.

12. The Respondent No. 1 has appeared at the hearing. The Respondent No. 2 is represented by Mrs. M. H. Doshi. Mrs. Doshi has also assisted the Court for reaching a just conclusion in the same way as Mr. Jayakar has assisted. Both the learned Counsels have assisted the Court quite well. The Court has taken note of all the submissions which can be reasonably made on the record of this appeal and thereafter decided this appeal.

13. No order as to costs.

14. Since the Respondent No. 1 is partially disabled person, the Registrar, High Court, Appellate Side, shall forward a copy of this order to the Respondent No. 1 by post with an international to the effect that the appeal is dismissed. The appellant is directed to pay the necessary amount to Respondent No. 1 in terms of the order passed by the trial Court expeditiously.

15. The Registrar is directed to return the record of the case expeditiously and latest within four weeks.