
(2014) 01 MAD CK 0011

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 282 of 2011

The New India Assurance Co. Ltd.

APPELLANT

Vs

Periyasmay and Others

RESPONDENT

Date of Decision : 10-01-2014

Acts Referred:

Workmens Compensation Act, 1923 — Section 2(1)(1) 30 4 4(1)(c)(ii) 4A(3)

Citation : (2014) 1 ACC 622 : (2015) ACJ 1648 : (2015) 2 AnWR 274 : (2014) 1 LLN 502

Hon'ble Judges : G.M. Akbar Ali, J

Bench : Single Bench

Advocate : S. Manohar, for the Appellant; U.M. Ravichandran and Mr. S. Vijayakumar for 1st Respondent and Ex-parte for R.2, for the Respondent

Final Decision : Dismissed

Judgement

G.M. Akbar Ali, J.—Civil Miscellaneous Appeals filed against the order dated 3.11.2010 made in W.C. Case No. 579, 580, 581, 582, 583, 584 of 2007 on the file of Court of Commissioner for Workmen's Compensation 2 (Deputy Commissioner of Labour-2), Chennai-6. All these appeals are arising out of compensation Commissioner awarded of by the Commissioner for Workmen's Compensation 2 (Deputy Labour-2), Chennai-6.

2. The appellant is the Insurance Company with which the vehicle, bearing Registration No. TN-27-B-5131, was insured. There are 6 claimants. They claimed compensation for the injuries sustained during the course of employment, when they were engaged as load men in the insured vehicle on 9.1.2007.

3. The appellant Insurance Company resisted the claim on various grounds denying the liability. However, the learned Deputy Commissioner of Labour found that the claimants were engaged as load men in the insured vehicle and the accident had happened during the course of employment and sustained injuries.

It was also found that there is a policy coverage for all the loadmen.

4. While assessing the compensation, the learned Deputy Commissioner relied on the disability certificate issued by the Doctor, who assessed the disability and individually fixed the loss of earning capacity and thereby granted various amounts to all the claimants.

5. Aggrieved by which, the Insurance Company is before this Court mainly on the ground that as per Sec. 4(1)(c)(ii) of the Workmen Compensation Act, only a doctor is competent to assess the loss of earning capacity and the Deputy Commissioner cannot fix the loss of earning capacity.

6. Reiterating the said ground, Mr. S. Manohar, learned counsel for the appellant Insurance Company submitted that in the case of non-schedule injury, loss of earning capacity cannot be fixed by the Commissioner and the permanent disability, as assessed by the doctor, will not amount to functional disability. The learned counsel relied on a decision reported in National Insurance Co. Ltd. Vs. Mubasir Ahmed and Another, , wherein it is held as follows:

7. These cases related to injuries which were not specified in Schedule I and such cases are covered by section 4(1)(c)(ii) Explanation. In terms of Explanation II the qualified medical practitioner has to assess loss of earning capacity having due regard to percentage of loss of earning capacity in relation to the different injuries in Schedule I. Explanation I also provides that where there are more than one injury, the aggregate has to be taken, so that the amount which would be payable for permanent total disablement is not exceeded.

8. Loss of earning capacity is, therefore, not a substitute for percentage of the physical disablement. It is one of the factors taken into account. In the instant case the doctor who examined the claimant also noted about the functional disablement In other words, the doctor had taken note of the relevant factors relating to loss of earning capacity. Without indicating any reason or basis the High Court held that there was 100 percent loss of earning capacity. Since no basis was indicated in support of the conclusion, same cannot be maintained. Therefore, we set aside that part of the high Court's order and restore that of the Commissioner, in view of the facts situation. Coming to the question of liability to pay interest, Section 4A(3) deals with that question. The provision has been quoted above.

7. The learned counsel also relied on a decision reported in Oriental Insurance Co. Ltd. Vs. Mohd. Nasir and Another, , wherein it is held

12. The statutes provide for determination of the extent of physical disability suffered by a qualified medical practitioner so as to enable him to assess the loss of earning capacity. Explanation I appended to clause) of sub-section (1) of section 4 provides that where there are more injuries than one, the aggregate amount of compensation has to be taken but the same should not exceed the amount which would have been payable in case of permanent total disablement.

8. The learned counsel further relied on a decision reported in 2010 ACJ 2859 (Pal Raj v. Divisional Controller, North East Karnataka Road Trans. Corpn), wherein the Apex Court has held as follows:

While computing compensation for disabilities being suffered by a workman in the case of his employment, it is the functional disability resulting in loss of earning capacity which is the criteria which is followed in assessing compensation. The Workmen's Compensation Act, 1923, hereinafter referred to as "the 1923 Act", has its own formula in computing compensation on account of injuries suffered during employment which is reproduced in Schedule I to the said Act. In Part II of the said Schedule the loss of earning capacity in terms of percentage has been directly related to the loss of any of the limbs and parts thereof, both of the upper limbs as also the lower limbs. Loss of earning capacity is commensurate to the injuries suffered and the loss of earning capacity as a result thereof.

9. The learned counsel further relied on a decision reported in 2012 (2) TNMAC 12 (National Insurance Co. Ltd. v. E. Chandru and another), wherein this Court held as follows:

12. While computing compensation for disability being suffered by a workman in the case of his employment, it is the functional disability resulting in Loss of Earning Capacity which is the criteria which has to be followed in assessing the compensation. The Workmen's Compensation Act, 1923 has its own formula in computing compensation on account of the injuries suffered during the employment which is reproduced in Schedule I to the said Act. In Part II of the said Schedule, the Loss of Earning Capacity in terms of percentage has been directly related to the loss of any of the limbs and parts thereof, both of the upper limbs and also the lower limbs. Loss of Earning Capacity is commensurate to the injuries suffered and the Loss of Earning Capacity as a result thereof.

10. On the other hand, Mr. U.M. Ravichandran, learned counsel appeared for Mr. S. Vijayakumar, for the claimants submitted that in case of non-schedule injury, the disability assessed by the doctor is a relevant factor and in each and every case the question which will have to be considered is whether the disablement has incapacitated the person to perform all work which he was capable of performing at the time of accident. The learned counsel relied on a decision reported in D. Shanmuga Anand Vs. M. Balasubramanian and Bajaj Allianz General Insurance Co. Limited, , wherein it is held

23. In each case, the question will have to be considered whether the disablement has incapacitated the person to perform all work which he was capable of performing at the time of the accident. We have to see whether he had capability, experience, expertise and competence for performance of such other work also. Merely because a person may be able to and can possibly perform certain other works, it would be irrational to assume that a driver, who has been disabled to do driving, can perhaps work as a shop keeper or to do

some other work (for which he has no competence or experience) he will not be entitled to claim that he is totally disabled u/s 2(1)(1) of the Workmen's Compensation Act.

11. The learned counsel also pointed out that the appeal is not maintainable as there is no substantial question of law involved and relied on a decision reported in Oriental Insurance Company Limited Vs. Mohan (deceased), G. Anandakumar and Mrs. Ramuammal, , wherein the Division Bench of this Court held

9. ...Even otherwise, the assessment of loss of earning capacity being a question of fact and the Authority has correctly assessed the same, in the light of section 30 of the Act, we do not find any substantial question of law for interference.

12. He also relied on a decision reported in 2004 1 TNMAC 42 (DB) (New India Assurance Company Limited v. Ponammal and others) where a division bench of this court held

17. Where the Commissioner has to deal with cases of permanent partial disablement inflicted by injuries which are not scheduled, the provisions of Section 4(1)(c)(ii) of the Act are attracted, and the Commissioner has to assess the compensation in terms of those provisions. In assessing the compensation in such cases, the most important and paramount thing that the Commissioner has to consider, is the loss of earning capacity. He has to consider,

(i) the nature of work that a workmen has to do;

(ii) the nature of the injury; and

(iii) other environmental circumstances

The principles upon which the loss of earning capacity u/s 4(1)(c)(ii) have to be determined are

1. Loss of physical capacity is not coextensive with loss of earning capacity

2. Loss of earning capacity is not coextensive with loss of physical capacity.

3. There may be cases where even the loss of physical capacity may be of such nature as to make it abundantly clear that there has been large, if not complete, loss of earning capacity even though there has been no immediate reduction in wages.

Medical evidence by itself is not conclusive or decisive factor in the loss of earning capacity. It can only establish the nature of disablement or the physical injury. But to what extent the physical disablement causes loss of earning capacity is not for medical evidence to state. It is for the Commissioner to settle in case of a dispute between the parties, and such settlement can only take place upon the basis that--

(a) there has been a loss of earning capacity caused by the said injury, and

(b) the estimate that should be made of such loss of earning capacity, should be proportionate to the loss of earning capacity caused by the injury.

13. Heard and perused the materials available on record.

14. The point for consideration in all these appeals is whether the Deputy Commissioner of Labour is right in fixing the loss of earning capacity of the claimants, relying on the disability certificate issued by the doctor.

15. Sec. 4(1)(c)(ii) of the Workmen Compensation Act reads as follows:

(4) Amount of compensation:--

(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:

(a)....

(b)

(c) Where permanent partial disablement results from the injury.

(i)....

(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.

16. From the above provisions, it could be derived that in the case of injury not specified in Schedule I otherwise which is called as Non-Schedule Injury, compensation has to be determined in proportion to the loss of earning capacity caused by the injury.

17. The wordings in the provision would show that the loss of earning capacity has to be fixed as assessed by the qualified medical practitioner. In other words, it means that the medical practitioner, who assessed the permanent disability has to assess the proportionate loss of earning capacity also. However the doctors who examined the claimants would assess only the permanent disability based on various factors and guidelines.

18. If the proportionate loss of earning capacity is also assessed by the doctor, then granting of compensation would not be difficult. The problem arises when the loss of earning capacity has not been assessed by the doctor, who certify only permanent/partial disability. Therefore, when the doctor has assessed only the quantum of disability such as permanent/partial disability, the burden falls on the authority concerned to assess the loss of earning capacity. Such assessment shall be based on the disability certificate, evidence of the doctor, examination of the injured claimant and the nature of work he was doing and capability of doing the same in future. Such assessment of loss of earning capacity can be made only on seeing the applicant in person and the commissioner of labour is the competent

authority to fix such loss of earning capacity based on the materials above stated.

19. This has been reiterated in the decisions reported in Oriental Insurance Company Limited Vs. Mohan (deceased), G. Anandakumar and Mrs. Ramuammal, , 2004 1 TNMAC 42 (DB) (New India Assurance Company Limited v. Ponammal and others), D. Shanmuga Anand Vs. M. Balasubramanian and Bajaj Allienze General Insurance Co. Limited, and 2012 (2) TNMAC 12 (National Insurance Co. Ltd. v. E. Chandru and another).

20. In 2004 1 TNMAC 42 (New India Assurance Co. Ltd. v. Ponammal and Others), the Division Bench categorically held

18. ...The Doctors very well estimate the loss of physical capacity for work, but the loss of physical capacity for work, but the loss of earning capacity must be estimated by some other person. The best estimate that can be given is by those people who would have the opportunity of seeing the workman work before and after the accident. The workmen Compensation Act is not concerned with physical injury as such nor with the mere effect of such injury on the physical system of the workmen, but it is concerned only with the effect of injury or of the diminution of the physical powers caused thereby on the earning capacity of the affected workman. To what extent the earning capacity has been affected, it can never be for a medical witness to say. Medical evidence is opinion evidence and it is only with regard to the physical aspect of the injuries that the opinion of a medical witness is relevant and admissible as the opinion of an expert. But the loss of earning capacity is not a matter of medical opinion and is not a matter to which a medical witness can possibly speak. The loss of earning capacity is not necessarily co-extensive with the loss of physical capacity and certainly the former does not prove the latter.

21. In Oriental Insurance Company Limited Vs. Mohan (deceased), G. Anandakumar and Mrs. Ramuammal, , the same Division Bench held the assessment of loss of earning capacity being a question of fact and authority has correctly assessed the same and there is no substantial question of law involved for interference.

22. The said observation is squarely applicable to the cases on hand and the Deputy Commissioner of Labour who had the opportunity of seeing the applicant in person has assessed the loss of earning capacity based on the permanent disability assessed by the doctor. Therefore, I see no reason to interfere with the order passed by the Deputy Commissioner of labour. In the result, all the civil miscellaneous appeals are dismissed and the order passed by the learned Commissioner for Workmen's Compensation 2 (Deputy Commissioner of Labour-2), Chennai-6 dated 3.11.2010 in W.C. Case Nos. 579, 580, 581, 582, 583, 584 of 2007 are confirmed. No costs. Consequently, connected Mps are closed.