

(2017) 03 GAU CK 0045
In the Gauhati High Court
Case No : 41 of 2004

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Sri. Pradip Dey, S/o Sri. Nihar Dey, & Anr.

RESPONDENT

Date of Decision : 21-03-2017

Acts Referred:

[Workmens Compensation Act, 1923](#), [Section 30](#), [Section 4A](#), [Section 2\(m\)](#), [Section 4\(1\)\(c\)\(2\)](#) - Appeals - Compensation to be paid when due and penalty for defau

Citation : (2017) 03 GAU CK 0045

Hon'ble Judges : S. Serto

Bench : SINGLE BENCH

Advocate : S.K. Goswami, R. Kathakatia, N. Goswami, S. Dutta

Judgement

1. This is an appeal under section 30 of the Workmen's Compensation Act, 1923, directed against the judgment and order dated 20.03.2003, of the Commissioner, Workmen's Compensation, Guwahati, passed in W.C. Case No. 270/2001. The facts and circumstances which has led to the filing of this appeal in brief, are as follows;

2. On 27.11.2001, the respondent No.1 in this case filed an application before the Commissioner, Workmen's Compensation, Ulubari, Guwahati-7 claiming as here below;- That he was an employee of one Md. Habibullah of Beltola, Guwahati, (the respondent No.2, in this case), as handyman in his Truck bearing Registration No. ML-05-A/8948. And on 23.06.2001, while he was so employed, the vehicle in which he was employed met with an accident at Simlaguri N.H. No.31, due to which he suffered serious injuries such as, i) fracture of lower end of fibula, ii) on the frontal region of scalp, and iii) on foot.

Soon after the accident he was taken to Barpeta Civil Hospital, and he was treated by the Senior Medical and Health Officer and later on by another Doctor namely, Mr. H.N. Gogoi of Gauhati Medical College. As a consequence of the

accident, and despite the medical treatment he was given, he had suffered injuries of permanent disablement, therefore, he was unable to continue with his job. In consequence thereof, he was terminated from service by the respondent No.2 (owner of the Truck). That Officer-in-Charge, Howly Police Out Post on received of the information registered a case regarding the accident as G.D.E No. 620 dated 23.06.2001. That soon after the accident the respondent No.2, was also informed about the same and the injuries suffered by him.

That he was only 20 years of aged at the time of accident and his monthly wage was Rs. 4,000/- including allowances. And that since he suffered injuries in the course of the employment he was entitled to compensation to the tune of Rs. 4,30,000/- with interest @ 12% p.a w.e.f 14.07.2001.

The respondent/petitioner impleaded the appellant/Insurance Company as the truck in which he was employed was ensured under Policy No. 321302/2/0/31/2001/1909, valid for the period of 04.12.2000 to 03.12.2001.

3. After receiving the notice issued by the Commissioner, the respondent No.2 (owner of the truck) filed a written statement admitting every claim of the respondent/claimant. The respondent No.2, who is the appellant in this case also filed a written statement in this case but, denying the claims of the respondent/claimant on the grounds stated as follows; (i) That the injuries which the respondent/claimant claims to have suffered does not conform to any of the permanent disablement as mentioned in Part-I or Part-II of the Schedule-I of the Workmen's Compensation Act, 1923, and no employer can legally terminate a workman when the workman sustains injury in the course of employment, therefore, the Insurance Company will not entertain any claim till a reply is received from the employer, which will satisfy the Commissioner.

(ii) That as to the age of the respondent/claimant the Insurance Company has nothing to say as the same will depend on documentary evidence produced by the respondent/claimant. But, as to the amount of his salary it is unrealistic because no handyman of a truck would have been paid Rs. 4,000/- per month.

(iii) That no police report was filed with the application which will enable the Insurance Company to investigate about the truth of the accident. It is also stated that the owner of the vehicle did not inform the Insurance Company regarding the accident, therefore, the Company was kept in the dark on the truth about the accident. That the requirements of the policy like Fitness certificate of the vehicle, R.C Book, Driving license of the Driver etc. were not produced, therefore, the respondent/claimant should not have awarded the compensation.

4. The Commissioner after examining the document available and considering the evidence given by witnesses produced by the respondent/claimant arrived to the conclusion as follows; Monthly salary of the respondent/claimant as Rs. 3,100/- and the age of the respondent/claimant as 20 years and calculated the compensation as follows;

60% of Rs. 3,100 X 224 (relevant factor) X 30% (% of loss of earning capacity) = Rs. 1,24,992/-. Accordingly, the learned Commissioner directed the appellant/ Insurance Company to pay a sum of Rs. 1,24,992/- as compensation to the respondent/claimant within 30 days from the date of receipt of a copy of the order and in case of default, to pay interest @ 9% p.a w.e.f. 27.11.2001 till the realisation of the full amount.

5. Not being satisfied the appellant/insurance company has come to this Court, assailing the judgment and order of the learned Commissioner on the following grounds. The grounds given in the appeal are reproduced verbatim;-

"a) For that the learned Commissioner has fail to appreciate the evidence on record in its proper perspective and as such the award passed by the Commissioner is not tenable in law in the facts and circumstances of the case. And as such same is not tenable in law and liable to be set aside.

b) For the learned Commissioner has failed to consider the basic principle of assessment of compensation for the non-schedule injuries sustained by the claimant and as such the award passed by the Commissioner is liable to be quashed.

C) For that the learned Commissioner has assessed the compensation on the basis of certificate issued by Doctor regarding disability suffered by the claimant. The Commissioner assessed the compensation and asses the loss of earning capacity by himself though under the law loss of earning capacity can be assess by only by a qualified medical practitioner not by the Commissioner. So, compensation assessed at is not tenable in law and liable to be quashed.

d) For that the learned Commissioner has assessed the monthly income of the injured at Rs. 3,100/- which include salary and daily allowances. Under the provisions of Motor Vehicle Act and Labour Act a worker cannot work 30 days in a month and as such assessment of monthly wage at Rs. 3,100/- per month is totally wrong against the established principle as provided in Motor Transport Workers Act, 1861 and definition of wage as defined in section 2(m) of the W.C Act and as such the assessment made by the Commissioner regarding compensation is not tenable in law and liable to be quashed.

e) For that, the Commissioner has assessed the compensation under Sec. 4(1) (C) of the Workmen's Compensation Act, 1923. But the disability suffered by the injured is temporary disablement as defined in Sec. 4(1)(d). But the Commissioner has assessed the compensation under section 4(1)(C) and as such the same is not tenable in law and liable to be quashed.

f) For that the assessment made by the Commissioner is against the established principle of law and as such same is liable to be quash.

g) For that the monthly income assessed by the Commissioner on the basis of daily allowance received by the injured against the provision laid down in Sec. 15 of the Motor Transport Workers Act, 1961. So, the assessment made by the

Commissioner and awarding of compensation of Rs. 1,24,992/- is against the principle of law and same is not tenable in law.

h) For that in any view of the matter, the impugned judgment and award dated 20.03.2003 is not tenable in law and same is liable to be quashed for not considering the provision Act of 1923."

6. After having heard the learned counsels representing the parties, this Court on 09.04.2004 framed the following issues;-

"The appeal shall be heard on the following substantial questions of law;-

1. Whether Commissioner can assess wages of an employee taking together salary and 30 days daily allowance, though u/s 2(m) of the Workmen's Compensation Act, allowances is not calculated as wages and motor transport worker cannot work 7 days in a week.

2. Whether when injury sustained by the claimant Pradip Dey is loss of partial vision of eye, loss of earning capacity is defined as 10% in the list of injuries deemed to result in permanent partial disablement in Part II of Schedule-I, a contrary opinion by given by Doctor saying 30% loss of earning capacity can be considered by the Commissioner?

3. Whether when injury sustained by the claimant is loss of binocular vision of eye and that is defined as permanent partial disablement whether that can be called as permanent disablement.

Any other substantial question of law so emerging in course of hearing shall also be considered with the permission of this Court".

Thereafter, this Court on 03.03.2016 added one more issue;

"Whether the Commissioner, W.C would have the jurisdiction and authority to award interest for the period prior to determination of the claim in case of a non-schedule injury?"

7. Supporting the case of the appellant/Insurance company Mr. S.K Goswami submitted that the injuries suffered by the respondent/claimant which were recorded at the initial stage is different from the one recorded later on. The learned counsel pointed out that initially the injury suffered by the respondent/claimant were recorded as fracture of lower end of right fibula, bruise on scalp of forehead and bruise on right foot. But later on, it was improved by the doctor who stated that the condition of the right eye of the respondent/claimant was deteriorating and he has lost binocular vision. And based on this the Commissioner had passed the judgment. The doctor's evidence is not worthy of trust, since it doesn't tally with the initial record of the injury suffered by the respondent/claimant. Further the learned counsel submitted that among the injuries recorded initially no mention was made of any injury of the eye, therefore, the doctor's version that the respondent/claimant lost his binocular vision cannot be taken at its face value and even if it has to be believed, the

cause of the same must have been other than the accident.

It is also submitted by learned counsel that the injury suffered by the respondent/claimant at best can be termed as loss of partial vision of one eye. Therefore, his case should come under Sl. No. 26 A of Part II Schedule- I of Workmen's Compensation Act, 1923, as such, his loss of earning capacity as given in that schedule has to be assessed as 10% only.

The learned counsel then submitted that the doctor when assessing the loss of earning capacity of a claimant has to consult Schedule 1 Part 2 of the Workmen's Compensation Act, 1923, but, in this case the doctor has failed to do so, therefore, his assessment should not have been accepted by the commission. The learned counsel referred to Section 4 (1) (c) (ii) of the Act, in support of his submission.

The learned counsel further submitted that no evidence is in the record which would show that the respondent/claimant is not in a capacity to do any other work. Therefore, the disablement if any suffered by the respondent/claimant cannot be termed as permanent binocular handicap, rather, his disablement should be assessed as partial visual disablement.

Regarding the interest granted by the Commissioner, the learned counsel submitted that the law is settled on this, that interest will start accruing only on completion of one month from the date of adjudication, therefore, grant of interest from the date of filing is erroneous, and as such, that needs to be rectified.

The learned counsel in support of his submission stated above referred to the decisions of this High Court in the cases reported in;

- i) 2009 (1) GLT 370 reported in NIC vs Bimal Nath & Others
- ii) Oriental Insurance Co. Ltd vs Paren Narzary & Another reported in 2012 (4) GLT 718.

The learned counsel also referred to the judgments of this High Court in two reported cases;

- i) MFA. No. 31 of 2005
- ii) MFA. No. 88 of 2008

8. Against these submissions of the learned counsel of the appellant, the learned Amicus Curiae submitted as follows; That Issue No.1 is no longer relevant since the appellant has not pressed on it.

Thereafter, the learned counsel by referring to Issue No.2 and 3 submitted that these two issues show that the appellant had admitted to the claimed of the respondent/claimant that he had suffered disablement included in Schedule-I Part-II of the Workmen's Compensation Act, 1923. Therefore, this Court has to proceed on the premise that the injury suffered by the respondent/claimant was

schedule injury. Secondly, the learned counsel submitted that the Doctor's evidence makes it very clear that the respondent/claimant had suffered from lost of his binocular vision, therefore, there is no room to hold otherwise. Thereafter, the learned counsel submitted that the lost of binocular vision means loss of total vision/sight of one of the eyes. The appellant having not question the Doctors while he had a chance to do have admitted on the truth of the Doctors finding, therefore, it is too late in the day to content against the findings of the Doctors. The learned counsel drew my attention to the deposition of the two Doctors who treated the respondent/claimant. On perusal of the deposition of the Doctors there is no room for doubting that the respondent/claimant had suffered lost of binocular vision due to the accident which happened in the course of his employment. Moreover, as rightly pointed out by the learned Amicus curiae, when the appellant did not cross-examined the Doctors at the time of trial, there is nothing this Court can do to change the same sitting on appeal.

The learned Amicus curiae further submitted that since the respondent/claimant, as stated above, is found to have suffered from total loss of sight on one of his eyes, the injury suffered by him would be one similar or as close to the one given at Sl. No. 26 of Part-II of Scheduled-I of Workmen's Compensation Act, 1923, therefore, the Doctor has rightly assessed his loss of earning capacity at 30%. I find the submission of the learned Amicus curiae more reasonable and acceptable then the submission of the learned counsel for the appellant on this because, Doctor Gogoi's evidence on record supports his submission.

The submission of the learned counsel for the appellant that it was Dr. Sarma of Barpeta hospital, who treated the respondent/claimant, therefore, one should not go by the evidence given by the Doctor H.N. Gogoi of Gauhati Medical College who certified that the respondent/claimant suffered from permanent lost of his binocular vision and 30% of earning capacity. This submission of the learned counsel for the appellant is not acceptable because, the respondent/claimant continued to his treatment after he was discharged from Barpeta hospital as medical papers which are in record makes the same evident.

In view of the above discussion, the Commissioner, Workmen's Compensation, Guwahati did not commit any error when he concluded that the respondent/claimant has suffered 30% loss of earning capacity. The submission of the learned counsel for the appellant that since no statement of the Doctor or no evidence is there to prove that the respondent/claimant is unable to work in other employment one cannot conclude that he has suffered permanent partial disability and has lost 30% earning capacity. This submission of the learned counsel appears to be out of context because what one has to see under the Act is whether the workman is able to or unable to continue in the employment he was in before the accident.

The learned Amicus curiae submitted that he has no reason to argue as regard to the submission of the learned counsel for the appellant in respect of the interest as no cross appeal was filed on that issue. This Court also do not feel the

necessity of indulging in long discussion on it as the law is settled regarding the same. Courts in the Country including this High Court in catena of cases have followed the interpretation of the words ".....shall be paid as soon as it falls due" appearing at section 4 A of Workmen's Compensation Act, 1923 as to mean from the date of adjudication. Therefore, interest on the compensation has to be made payable only after 1(one) month from the date of adjudication or judgment. As such, there is no reason to hold otherwise in this case.

9. In view of above discussion, the following conclusions are drawn; On Issue No.1, I find no legal infirmity in the conclusion drawn by the learned Commissioner when he added daily allowance of the respondent/claimant amounting to Rs. 70/- per day to his monthly salary of Rs. 1,000/- because the daily allowance given to him was a part and parcel of his pay package. It would be unreasonable to assume that a person working in that kind of employment would have been given only a sum of Rs. 1,000/- per month as salary. Further the daily allowance does not come under the exclusion clause of section 2(m) of Workmen's Compensation Act, 1923.

As on the Issue No. 2 and 3 as discussed above, the respondent/claimant suffered from partial permanent disablement which is close to the one given at Sl. No. 26 of Schedule-I Part-II, therefore, the Doctor and the Commissioner, Workmen's Compensation, Guwahati, were right in coming to the conclusion that the respondent/claimant suffered from 30% loss of earning capacity. In view of this conclusion, the issue framed on 03.03.2016 i.e. "Whether the Commissioner, W.C would have the jurisdiction and authority to award interest for the period prior to determination of the claim in case of a non-schedule injury?" need no further discussion.

Regarding the interest granted by the Commissioner from the date of filing of the petition, the same would need to be set aside/modified because the law on the same settled. In the case of National Insurance Co. Ltd. Versus Mubasir Ahmed & Anrs., reported in (2007) 2 SCC 349. The Apex Court in Mubasir Ahmed (supra) has held that the interest under section 4 A(3) is payable if there is default in paying the compensation due under the Act within 1(one) month from the date it fell due. It has further been held that the date on which it becomes due is the date of adjudication.

Accordingly, the judgment and order of the Commissioner, Workmen's Compensation, Guwahati is upheld but with this modification that the interest shall be payable after 1(one) month from the date of delivery of judgment by the Commissioner.

With this the appeal is disposed. No order as to cost.