
(1992) 09 KL CK 0010
In the High Court Of Kerala

United India Insurance Co. Ltd and Others	APPELLANT
Vs	
Sethu Madhavan and Others	RESPONDENT

Date of Decision : 26-09-1992

Acts Referred:

Employees Compensation Act, 1923 — Section 11, 19, 2, 20, 22
Evidence Act, 1872 — Section 1, 45

Citation : (1994) 1 ACC 577

Hon'ble Judges : T.L. Viswanatha Iyer, J;L. Manoharan, J

Bench : Division Bench

Judgement

L. Manoharan, J.—These appeals by the Insurance Companies filed u/s 30 of the Workmen's Compensation Act, 1923 (for short "the Act") raise common questions for determination. Respondents workmen in the respective appeals filed petitions u/s 22 of the Act for compensation and the Commissioner passed awards. They are challenged. These cases fall u/s 4(1)(c)(ii) of the Act inasmuch as the injuries sustained by the workmen did not answer the description of the injuries specified in Part I or II of Schedule I of the Act.

2. In M.F.A. No. 126 of 1990, though Exh. A-2, disability certificate, states the disability of the workman at 50 per cent, the Commissioner for Workmen's Compensation found the loss of earning capacity at 100 per cent and awarded compensation accordingly. In M.F.A. No. 985 of 1990, Exh. A-4, the disability certificate, states permanent disability of 30 per cent, the Commissioner found the loss of earning capacity at 45 per cent and awarded compensation on that basis. In M.F.A. No. 58 of 1992, Exh. P-2, disability certificate, did not mention the percentage of disability, the Commissioner found the loss of earning capacity to be 40 per cent and compensation was awarded accordingly. In M.F.A. No. 404 of 1992, Exh. A-7, disability certificate, did not mention the percentage of disability, but the Commissioner found the loss of earning capacity at 45 per cent and awarded compensation on that basis. In M.F.A. No. 505 of 1992 also the percentage of disability was not mentioned in Exh. P-4, disability certificate, the Commissioner found loss of earning capacity at 40 per cent and compensation

was awarded.

3. As could be seen from the above, in cases where the qualified medical practitioner certified the percentage of disability the Commissioner did not accept the same; instead fixed a higher percentage of loss of earning capacity and awarded compensation. Even in cases where the certificate did not mention the percentage of disability, the Commissioner fixed percentage of loss of earning capacity and on that basis awarded compensation. This is attacked by the appellants as without jurisdiction, as according to them, in terms of Section 4(1)(c)(ii) of the Act the Commissioner has no jurisdiction to fix a percentage of disability at variance with the percentage of disability certified by qualified medical practitioner. Learned Counsel maintained, the Commissioner has no discretion in the matter. According to him, since the very section itself states that the compensation has to be assessed on the basis of the earning capacity as assessed by the qualified medical practitioner, where the qualified medical practitioner certifies the percentage of loss of earning power the Commissioner has to accept the same. It then was contended, where the medical practitioner did not certify the percentage of loss of earning capacity the Commissioner has to refer him to qualified medical practitioner to assess the same. According to learned Counsel for the appellants, in the absence of assessment as to the loss of earning capacity the Commissioner cannot fix compensation in a case like the present one that falls u/s 4(1)(c)(ii) of the Act. Yet another point raised was that the medical certificate issued by the qualified medical practitioner cannot be admitted in evidence without examining the doctor who issued the same and so long as the doctor is not examined the certificate cannot be relied on for finding the percentage of loss of earning power.

4. On the other hand, on behalf of the worker it was contended, the Commissioner being the authority to fix the compensation under the Act, it is for him to fix the loss of earning capacity on the basis of which the compensation is to be awarded. Therefore, according to him, even where the approved medical practitioner has not certified the percentage of loss of earning capacity the Commissioner can fix the same on other evidence. In other words, according to him, the certificate issued by qualified medical practitioner is only a piece of evidence just like other evidence and it is for the Commissioner to judge its probative value and effect.

5. For a correct appreciation of the rival contentions it is necessary to read Section 4 of the Act.

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

(a) where death results from the injury an amount equal to forty per cent of the monthly wages of the deceased workman multiplied by the relevant factor;

or

an amount of twenty thousand rupees, whichever is more;

(b) where permanent total disablement results from the injury an amount equal to fifty per cent of the monthly wages of the injured workman multiplied by the relevant factor;

or

an amount of twenty-four thousand rupees, whichever is more;

Explanation I.-- xxx xxx xxx

Explanation II.-- xxx xxx xxx

(c) where permanent partial disablement results from the injury

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(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.

(Emphasis supplied)

Explanation I.-- xxx xxx xxx

Explanation II.--In assessing the loss of earning capacity for the purposes of Sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I;

(d) Where temporary disablement, whether total or partial, results from the injury a half-monthly payment of the sum equivalent to twenty-five per cent of monthly wages of the workman, to be paid in accordance with the provisions of Sub-section (2).

As already noticed, since the injuries sustained by the workmen in these cases were not Schedule injuries, these cases are governed by Section 4(1)(c)(ii). That being the position, the thrust of the argument of the learned Counsel for the appellants was consistent with the policy underlying Section 4, wherein even in the case of Schedule injury percentage of loss of earning capacity is fixed in the Schedule. With respect to injuries which are not specified in Schedule I, Section 4(1)(c)(ii) insists the compensation has to be on the basis of loss of earning power "as assessed by qualified medical practitioner". The learned Counsel pointed out that "disability" and "disablement" are medico-legal terms; whereas "disablement" signifies only loss of function without loss of earning power, "disability" signifies loss of function and earning power. Therefore, when the

qualified medical practitioner certifies the percentage of "disability" that takes in loss of earning power also and, therefore, the Commissioner, in the circumstances, need not enquire anything more in fixing the loss of earning power.

6. At page 400 of Stedman's Medical Dictionary, 23rd Edition, the meaning of "disability" and "disablement" is given which reads:

"Disability" medico-legal term signifying loss of function and earning power.

"Disablement" medico-legal term signifying loss of function without loss of earning power.

7. We consider, this argument has to be examined with due regard to the scheme of the Act and its object. In that regard the nature of enquiry before the Commissioner and his jurisdiction as per the provisions in the Act and Rules acquire particular importance. The dictionary meaning need not be conclusive in all situations. Further merely because "disability" literally could take in not only loss of function but also loss of earning power, that need not mean, merely because percentage of disability is mentioned the same represents loss of earning capacity also. That will essentially depend upon the competency of the person who certifies the same. Naturally, therefore, the question that calls for analysis and adjudication is whether a qualified medical practitioner is competent to assess the loss of earning power also apart from the percentage of "disablement"; and even if he is competent, whether his assessment as to the loss of earning power could be the last word on that.

8. Section 3 of the Act makes the employer liable for the personal injury caused to the workman by accident arising out of and in the course of his employment. Section 4 concerns the quantification of the compensation payable u/s 3 of the Act. As per Section 19 if any question arises in any proceeding under the Act as to the liability of any person to pay compensation including any question as to whether a person injured is or is not a workman such question shall be settled by a Commissioner. Part V of the Rules deals with the procedure before the Commissioner. As per Rule 24, the Commissioner can summarily dismiss an application. Rule 28 requires him to frame issues and Rule 32 requires the Commissioner to pronounce the judgment. Thus Section 19 of the Act would unambiguously show that it is the Commissioner who is conferred with the jurisdiction to adjudicate all questions leading to determination of the compensation to be awarded on account of the loss of earning capacity of workman resulting from his sustaining employment injury and also compensation on account of the death of the workman on sustaining employment injury. This aspect has to be kept in view in appreciating the argument of the learned Counsel to the effect that the Commissioner has to mechanically accept the percentage of disability assessed by the medical practitioner.

9. The scheme of Section 4 of the Act read with Part II of Schedule I would show that the compensation payable is based on the age, wage and the disability (loss

of earning capacity of the injured workman). In the case of injuries falling under the Schedule the statute by fiction fixes the loss of earning capacity on the basis of which the compensation is to be awarded. Disablement cannot be equated with loss of earning power. Disablement need not be co-extensive with loss of earning power.

10. A certificate prescribing the nature of the injury and its impact on the organ of the human body involves technical and special knowledge with regard to the same and, therefore, expert opinion as regards that aspect becomes necessary. The nature of the injury, the part where it is inflicted and the effect it produces require expertise and, therefore, the opinion of an expert in that regard becomes relevant and necessary. The evaluation of the nature of injury is objective. Then its effect on the functioning of organ is also a matter for the expert. But how far that would affect his earning capacity since depends on other factors also, it cannot be a matter exclusively for the expert to say. This would depend upon not only the physical condition of the injured and the place where the injury was sustained, but would also depend upon the nature and character of the avocation of the workman at the time when he sustained the injury. There could be several instances where the same type of injuries could produce varying degrees of adverse effect as to the earning capacity, for a particular injury in relation to a particular avocation could result in a total disablement in earning capacity, whereas it need not produce that result with respect to another avocation. Loss of a finger of a painter could result in total loss of earning power, but a loss of a finger of a headload worker need not have that effect. Therefore, the percentage of disablement cannot be co-extensive with the loss of earning capacity in all situations. Loss of earning capacity has inexorable nexus with the type of profession of the workman. One of the ingredients to be taken into account in fixing the compensation is the loss of earning capacity, and loss of earning capacity is not equivalent or same as disablement. An expert like a doctor certainly is competent to opine as to disablement; but the same cannot be said in the case of loss of earning power. Loss of earning power though is consequent upon disablement the percentage of the same cannot and need not be same as the percentage of disablement. As the percentage of loss of earning power depends upon the disablement and other factors, the same is a question of fact depending upon the nature of work, the age of the workman, etc. This aspect is dealt with by Chakravarti, C.J. in the decision in *Kali Das Ghosal Vs. S.K. Mondal*, . It is stated at page 662:

The Workmen's Compensation Act, however, is not concerned with physical injury as such, not with the mere effect of such injury on the physical system of the workman, but it is concerned only with the effect of such injury or of the diminution of 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 loss

of earning capacity is not a matter for medical opinion and not a matter to which a medical witness can possibly speak.... After the medical evidence as to the nature of and measure of the physical infirmity has been given, the substance of that evidence is to be taken over and applied in the assessment of the loss of earning capacity as one of the factors and perhaps the principal factor. But loss of earning capacity or the extent of it is a question of fact. It has got to be determined by taking into account the diminution or destruction of physical capacity, as disclosed by the medical evidence and then it is to be seen to what extent such diminution or destruction could reasonably be taken to have disabled the affected workmen from performing the duties which a workman of his class ordinarily performed and from earning the normal remuneration paid for such duties.

(Emphasis supplied)

This decision was followed in later decisions in *Calcutta Licensed Measurers Bengal Chamber of Commerce Vs. Md. Hossain, and Commissioner for the Port of Calcutta v. Ajit Kumar Ghosh* 1970 ACJ 320 (Calcutta). This particular aspect is brought to the focus in the decision of the Supreme Court in *Pratap Narain Singh Deo v. Shrinivas Sabata* 1976 ACJ 141 (SC). In that case the workman was a carpenter and he sustained employment injury which resulted in the amputation of his left arm above the elbow. In that case the Supreme Court held with due regard to his profession as a carpenter the amputation of the left arm was total disablement as he was rendered unfit for work of carpenter since the carpenter's work cannot be done with one hand. This decision was relied on by this Court in the decision in *Kochu Velu v. Purakhattu Joseph* 1984 ACJ 630 (Kerala). There the claimant was a tree climber. He fell down from the tree and sustained multiple fracture on the left hand. Relying on the decision in *Pratap Narain Singh Deo's* case (supra) this Court held that he being a tree climber with the loss of fingers as he cannot climb trees thereafter the same is a total and permanent disablement as defined in Section 2(1)(1) of the Act.

11. The Act undoubtedly is a welfare legislation aimed to ameliorate the agony of a workman who became incapacitated on account of injury sustained by him during the course of employment. The social obligation to care for his welfare finds emphatic expression in this welfare legislation. Therefore, an interpretation which would advance that salutary object and intentment has to be adopted and Courts have not failed in giving effect to the same. Even in the case of injuries covered by Schedule I the percentage of loss of earning capacity mentioned therein was held to be only the minimum. In such a case though on proof of sustaining Schedule injury the workman could establish the loss of earning capacity as mentioned in the Schedule, that being the minimum he can prove the loss of earning capacity in fact is more. [*Samir U. Parikh v. Sikander Zahiruddin* 1984 ACJ 113 (Bombay)]. A Division Bench of the Gujarat High Court in the decision in *State of Gujarat Vs. Rajendra Khodabhai Deshdia and Others*, , held:

The criterion for determination of the amount of compensation is the loss of

earning capacity.... Therefore, irrespective of the fact as to whether the workman has suffered injuries specified in the Schedule or injuries which are not specified in the Schedule, the amount of compensation is to be determined on the basis of the loss of earning capacity suffered by the workman. The only difference is that in cases wherein the workman suffered injuries specified in the Schedule, rock-bottom is fixed by the legislature by creating deeming fiction...

12. In a case u/s 4(1)(c)(ii) of the Act a Division Bench of the Calcutta High Court in *Sarat Chatterjee & Co. v. Mohd. Khalil* 1979 ACJ 106 (Calcutta) advertent to the function of the medical evidence held, the medical evidence can establish the injury suffered by the workman and the extent of his physical disability; and that the medical evidence could provide the basic material for assessing the loss of earning capacity of a workman. In the decision in *State of Gujarat Vs. Rajendra Khodabhai Deshdia and Others*, it is pointed out that the basic criterion for determination of amount of compensation in both, Section 4(1)(c)(i) as well as Section 4(1)(c)(ii) of the Act is the same, i.e., the loss of earning capacity. But in a case that falls u/s 4(1)(c)(i) of the Act the workman has added advantage inasmuch as the statute itself fixes the minimum loss of earning capacity whereas in the case of Section 4(1)(c)(ii) of the Act he has to establish objectively the injury suffered by him and that thereby he sustained loss of earning capacity of a particular magnitude.

13. What requires to be stressed in this connection is that the decisions are to the effect that even in the case of Schedule injuries with respect to which the percentage of loss of earning capacity is fixed, the same is only the minimum and that cannot prevent the workman from proving higher percentage of loss of earning capacity. With respect to a case which falls u/s 4(1)(c)(i) and (ii) it need hardly be said that the percentage of disablement ipso facto cannot be treated as a disability taking in loss of earning capacity also. Thus, we are certain that, though the disability certificate is one of the basic documents necessary to establish the disablement sustained by the workman as a result of sustaining the injury that cannot be equated with the loss of earning power. Loss of earning power is a question of fact which has to be judged on the basis of the nature of the injuries sustained and also with due regard to the nature of the avocation of the workman at the time when he sustained the injury along with other attending factors. The principles laid down in *Kali Das Ghosal Vs. S.K. Mondal*, are clear pointers to conclude, it is not for the medical practitioner to speak as to the loss of earning power but the same is a question which is to be adjudicated by the Commissioner. As is observed in *Ajit Kumar's* case 1970 ACJ 320 (Calcutta), the loss of earning capacity is not necessarily co-extensive with loss of physical capacity. Therefore, the medical evidence though relevant cannot be decisive. A surgeon could estimate loss of physical capacity for work; but the loss of earning capacity must be estimated not only on the basis of the physical capacity to work but also with due regard to the nature of the work which he was attending and was capable of at the time when he sustained the injury.

14. The thrust of the argument of the learned Counsel for the appellants is that the said decisions cannot apply as according to them Section 4(1)(c)(ii) of the Act as it now stands after the amendment by Act No. 22 of 1984 since enjoins that the loss of earning capacity should be as assessed by the qualified medical practitioner, the same cannot be judged by the Commissioner. In short, according to them, that is the matter for the qualified medical practitioner to decide. We do not consider that the said argument is acceptable. Apart from the fact the principles evolved in the said decisions still have enduring relevance, as already noticed, as per the scheme of the Act, since it is for the Commissioner to decide as to the quantum of compensation and the main ingredient to decide the said quantum being loss of earning capacity that factor too should be a matter amenable to the jurisdiction of the Commissioner who alone is charged with the duty of adjudicating the compensation payable to the workman. But then, in deciding the loss of earning capacity the basic document to be looked into certainly is the certificate by the qualified medical practitioner. It could also be relevant and possible for an expert to say whether with such injury a person would be able to do a particular work; but to permit the opinion of the expert to take the place of the finding which under the Act is to be entered by the Commissioner is opposed to the very basis of adjudicatory process and exercise of jurisdiction. A certificate may be vitiated because it may not contain details upon which the medical practitioner reached the conclusion, and it could be shown to be vitiated on other vitiating circumstances.

15. The significance of the words "as assessed by the qualified medical practitioner" in Section 4(1)(c)(ii) now has to be adverted to. An interpretation that would result in rendering any particular word/words in a statute otiose or meaningless cannot be adopted. But at the same time in interpreting this provision one should not forget its object as a welfare legislation. Being a welfare legislation it should receive purposive interpretation. The said portion of the Section would enable to act upon the percentage of loss of earning capacity assessed by the qualified medical practitioner as the basis for judging the loss of earning power unless there is other data indicating that such assessment is vitiated. In other words, in the absence of other data the assessment by the qualified medical practitioner as to the loss of earning capacity should be the basis for assessing the quantum of compensation. The Section thus enables to act upon the certificate even without examining the medical practitioner and it would be open to the affected party to prove the conclusion reached by the medical practitioner is vitiated. In short, in terms of Section 4(1)(c)(ii) of the Act in deciding the percentage of loss of earning capacity the basic document being the certificate issued by the qualified medical practitioner, the same cannot be dispensed with; as to what is its probative value has to be judged with due regard to the other data indicating the contrary.

16. In this context it is necessary to advert to Section 20(3) of the Act and also Explanation II to Section 4(1)(c)(ii) of the Act. Explanation II only gives guidelines to the medical practitioner in assessing the percentage of loss of

earning capacity. He is entitled to give his opinion as to the loss of earning capacity. Section 20(3) of the Act states that the Commissioner may, for the purpose of deciding any matter referred to him for decision under this Act, choose one or more persons possessing special knowledge of any matter relevant to the matter under inquiry to assist him in holding the inquiry. Thus necessary provision having been made in Section 20(3) of the Act to avail the assistance of any person possessing special knowledge to adjudicate the matter in issue before him it is idle to contend that the Commissioner has to ipso facto accept the certificate of the doctor prescribing the percentage of loss of earning capacity. If that were the position, the provision like Section 20(3) of the Act need not have been there. Simply because loss of earning capacity has to be as assessed by the qualified medical practitioner it is not correct to say, the said opinion cannot be subject to scrutiny by the Commissioner who alone as per the provisions under the Act has got the jurisdiction to find the quantum of compensation. We may hasten to add that the primary data in judging the percentage of loss of earning capacity being the opinion of the qualified medical practitioner, it would be hazardous to make an inference as to the loss of percentage of earning capacity without the aid of the certificate by the qualified medical practitioner. Consequently, it certainly is a question of fact whether in a particular case there was data before the Commissioner to come to a conclusion as to the percentage of loss of earning capacity. In appropriate cases the Commissioner even suo motu can refer the workman to the expert for such opinion. The Commissioner can also summon the doctor where there is ambiguity in the certificate as to the loss of earning capacity. Generally, where a particular party applies for the examination of the doctor in pursuance of his challenges that the certificate is unacceptable; the Commissioner, with due regard to the circumstances, may allow the request unless the Commissioner feels that there is already data on record as indicated above to correctly judge the percentage of loss of earning capacity and the steps sought for, in the circumstance, are vindictive or oppressive.

17. When it is said the opinion of the qualified medical practitioner is relevant and basic in deciding loss of earning capacity, its probative value has to be judged with due regard to the injury, its effect and the nature of work in which the workman was engaged. Being welfare legislation the application of the principles and procedure in this regard should not be to the prejudice of the workman. This is particularly so, since as per Section 11 of the Act the employer can get the worker examined by a qualified medical practitioner of his choice. The object of this legislation is rooted in humanism. One should be guarded against influence being brought on the medical practitioner by the employer as his position, status and resources could enable him to attempt the same. In the absence of evidence indicating the same, the medical opinion as to the percentage of disability can be accepted and considered in the light of other relevant factors. Counsel for the applicant also relied on the decision of this Court in M.F.A. Nos. 879 of 1988 and 6 of 1989 in support of the contention that the

Commissioner has no discretion to fix loss of earning capacity. In that case on a finding that the case fell u/s 4(1)(c)(ii) of the Act and the certificate since did not mention the percentage of loss of earning capacity, the decision of the Commissioner was set aside and the case was remitted for determining the proportionate loss of earning capacity by a medical practitioner. We have already pointed out, certificate of loss of earning capacity is the basic document upon which the compensation is to be adjudicated.

18. Now what remains to be considered is the argument that these certificates since were not proved by examining the doctor who issued the same, these could not have been admitted in evidence and acted upon. Reliance was made in the decisions in *Panchanan Ghose Vs. Bhaggu Bari*, and *Merchant Steam Navigation Co. Ltd. v. Mohammed Kunju Appukka* 1956 KLT 69 to contend that the medical certificate being worst form of hearsay evidence the same cannot be admitted in evidence without examining the doctor who issued the same. Reliance was also placed by the learned Counsel on the decision in *State Vs. Bhasusa Hanmantsa Pawar*, in support of the said argument. In this case, as was noticed, the medical certificates were admitted in evidence and were acted upon by the Commissioner. The question for consideration in the circumstance is, whether the provisions of Evidence Act, 1872, can be applied to a proceeding before a quasi-judicial Tribunal like the Commissioner for Workmen's Compensation Court. The provisions of the Evidence Act, 1872 are not made applicable to a proceeding before the Commissioner functioning under the Act. As per Section 1 of the Evidence Act, the Act would apply to judicial proceedings in or before any Court, including court-martial, other than court-martial convened under the Army Act, etc. Administrative or quasi-judicial Tribunals are fact-finding bodies, and the method of fact finding varies from that sanctioned by law in Courts. If the Evidence Act is made applicable the same would make unavailable the gathering of evidence in an expert manner, which is the essence of the fact-finding bodies and with due regard to its character they should be open for the reception of all the relevant evidence which will contribute to an adjudication before it. The administrative and quasi-judicial proceedings are not fettered by technical rules of evidence and the Tribunals are entitled to act on materials which may not be accepted as evidence in a Court of law. But they should adhere to the rules of natural justice. In the decision in *Union of India v. T.R. Varma* AIR 1957 SC 882 holding that the Evidence Act has no application to enquiries conducted by Tribunal even though they may be judicial in character, it was stated that they should observe rules of natural justice. It is held:

The law requires that such Tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that which obtains in a Court of law.

Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of

adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them.

If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed.

It cannot, therefore, be contended that the medical certificate cannot be admitted in evidence without examining the doctor. Once it is shown that the appellant had opportunity to cross-examine the witnesses and they were afforded enough opportunity to explain the documents relied on by the workman in support of his contention then the proceedings cannot be called in question on the ground that Section 45 of the Evidence Act is not complied. As has already been noted it will be open to the party interested in challenging the medical certificate to apply for steps to examine the doctor which the Commissioner will consider in the light of the principles already mentioned in the judgment.

19. With due regard to the said principle, we may now take up the individual cases. In M.F.A. No. 126 of 1990, the injured was a driver. Exh. A-2, the disability certificate, mentioned the disability at 50 per cent, but the Commissioner found the disability at 100 per cent. Exh. A-2 certificate, issued by the Assistant Professor in Orthopaedics, Medical College, Kozhikode, also certified that the injured is permanently disabled and hence he is unable to drive the vehicle. The data in Exh. A-2 itself showed the workman was permanently disabled from driving vehicle. This certainly would show that there was total loss of earning capacity as he cannot drive thereafter, and driving was his profession. In such a situation we are unable to accept the contention of the learned Counsel that the Commissioner exceeded its jurisdiction in fixing the loss of earning capacity at 100 per cent. It was contended, the Commissioner awarded more than what was claimed. Once it is found the loss of earning capacity is 100 per cent, simply because the worker out of ignorance claimed only a lesser amount cannot permit the Commissioner to reduce the compensation to that amount. [K.P. Kurian v. Hindustan Shipping Co. 1974 ACJ 493 (Kerala)]. M.F.A. No. 126 of 1990 is liable to be dismissed.

20. In M.F.A. No. 985 of 1990, the workman was a cleaner. In Exh. A-4, disability certificate, the disability was found to be 30 per cent, but the Commissioner found loss of earning capacity at 45 per cent. Exh. A-4, certificate, contains the relevant data as to the nature of injuries, it also mentions that he had 100 per cent temporary disability which later was reduced to 50 per cent and at the issuing of the certificate the same was 30 per cent. The character and nature of injuries justify the conclusion of the Commissioner that his loss of earning capacity is 45 per cent. With due regard to the avocation of the worker as a cleaner and the nature of the injuries sustained by him we are not prepared to

agree with the learned Counsel that fixing of 45 per cent disability is in any way arbitrary or not supported by the relevant data. M.F.A. No. 985 of 1990 is liable to be dismissed.

21. In M.F.A. No. 58 of 1992, the injured was a driver of an auto-rickshaw. Exh. P-2, medical certificate, did not mention the percentage of disability. It is stated that there is instability of the left ankle with recurrent attack of synovitis of the left ankle and hence he is incapacitated to work as a driver. On the basis of the said certificate the Commissioner found the loss of earning capacity at 40 per cent. Though Exh. P-1, I.P. card, showed there was injury to the lateral ligament of left ankle and due to the same the injured feels instability of left ankle the Commissioner was not prepared to hold, on the basis of Exh. P-1, loss of earning capacity at 100 per cent as he is incapacitated to work as driver and fixed the loss of earning capacity only at 40 per cent. As has been noted, Exh. A-2 though said the workman is incapacitated to work as a driver did not mention the percentage of the disability. In the circumstance pointed out above it was a case where the worker should have been referred to the doctor to assess the percentage of loss of earning capacity.

22. In M.F.A. No. 404 of 1992, the worker was a driver. There was a fracture in his left wrist. Exh. P-7, certificate, did not mention the percentage of disability. But it is stated that because of the above problem patient will not be able to utilise the left hand properly for driving, which may seriously affect his profession. The Commissioner fixed the loss of earning capacity at 45 per cent. The order mentions that the petition for referring the injured to a Medical Board was rejected. In the circumstance, the details of the injuries and the percentage of disability having been not mentioned in Exh. P-7, the prayer of the appellant to refer the workman to the Medical Board should have been allowed for it cannot be said there was data to fix the loss of earning power. Therefore, the order is liable to be set aside and the matter is remitted back for referring the injured workman to a Medical Board for examination and certificate as to percentage of disability.

23. In M.F.A. No. 505 of 1992, the workman was a driver in a jeep. The percentage of disability is not mentioned in Exh. P-4, the disability certificate. It is contended, there also an application was filed for referring the injured to a Medical Board, which was rejected by the Commissioner. Commissioner fixed loss of earning capacity at 40 per cent. Appellant produced copy of the disability certificate. It was contended even the nature of the injuries would not justify a conclusion that the loss of earning capacity was 40 percent. In this case also the prayer for examining the workman by a Medical Board to certify the percentage of loss of earning power ought to have been allowed. As it is, the data was not sufficient to fix the loss of earning power. Therefore, the order also is liable to be set aside and the matter has to be remitted.

24. In the result M.F.A. No. 126 of 1990 and M.F.A. No. 985 of 1990 are dismissed. The orders in M.F.A. Nos. 58 of 1992, 404 of 1992 and 505 of 1992

are set aside and the same are remitted to the Commissioner for disposal as indicated above. After obtaining the certificates concerning the percentage of disability, the Commissioner will fix the percentage of loss of earning capacity and dispose of the matter in the light of what is stated in this judgment. The matter shall be disposed of expeditiously, at any rate within two months from the date of receipt of records. Send the records immediately.