(2015) 09 GAU CK 0044

In the Gauhati High Court

Case No : M.F.A. No. 32 of 2007

United India Insurance Co. Ltd. — APPELLANT

Vs

Imdadul Shiekh and Others — RESPONDENT

Date of Decision : 22-09-2015

Acts Referred:

Workmens Compensation Act, 1923 — Section 19, 2(i)(g), 30, 4(1)(c)(ii)

Citation : (2016) 148 FLR 664 : (2015) 4 LLJ 534 : (2016) 1 LLN 116 : (2016) LLR 311

Hon'ble Judges : Nishitendu Chaudhury, J.

Bench : Single Bench

Advocate : S. Dutta, Advocate, for the Appellant

Final Decision : Allowed

Judgement

Nishitendu Chaudhury, J.—The Judgment and award dated 22.1.2007 passed by the learned W.C. Commissioner, Dhubri in WC No. 24 of 2003 thereby holding the insurance company liable to make payment of Rs. 88,401/- as compensation along with interest @ 9% per annum has been called in question in the present appeal under Section 30 of the W.C. Act, 1923 by the insurance company. The material facts giving rise to the present appeal is that one Md. Imdadul Sheikh as claimant approached the W.C. Commissioner at Dhubri and thereupon W.C. Case No. 24 of 2003 of the said court was registered. According to the claimant, he was employed as handyman under one Bipad Bhajan Paul to the proceeding in connection with the vehicle No. AS-14/0298 and on 2.3.2002 while discharging duty as handyman, the vehicle met with an accident as some miscreants had attacked the vehicle. The claimant stated that he sustained grievous injuries resulting in rupture of lung tissue apart from chest injury. He was admitted to Dhubri Civil Hospital for treatment as indoor patient for 36 days and thereupon treated by a doctor at Guwahati Medical Hospital for better investigation. Chapar P.S. Case No. 29 of 2002 was registered in connection with the aforesaid incident. According to the claimant, he was earning Rs. 2000/- per month including all allowances and that he was 40 years of age at the time of the incident. He further disclosed that the vehicle was covered by valid insurance company of the opposite party No. 1, United India Insurance Company ltd.

2. On being summoned, opposite parties appeared. Opposite Party No. 2 by filing written statement admitted the incident as well as the employment of the claimant and also about the quantum of payment made to him towards monthly salary. The opposite Party No. 1 insurance company on the other hand denied its liability and challenged the whole proceeding on various grounds.

3. Upon consideration of the rival contentions of the parties, the W.C. Commissioner framed the following issues:

(i) Is there any cause of action for the claim petition?

(ii) Whether the claim petition is maintainable in its present form?

(iii) Whether the O.Ps. are liable to pay compensation as claimed by the claimant petitioner?

(iv) If yes, what relief is the claimant petitioner entitled to?

4. The claimant examined himself as CW-1 and one Dr. Tapan Roy Choudhury as PW-2. But no material was produced by either of the witnesses to show that the claimant was permanently and partially disabled and that his earning capacity was thereby reduced. The W.C. Commissioner in the absence of any assessment by a qualified medical practitioner in respect of physical disability as well as loss of earning capacity, himself assessed that claimant was physically disabled by 40% and that he had lost earning capacity to the same extent. With these findings, the W.C. Commissioner arrived at the assessment and directed the insurance company to make payment of Rs. 88,401/- alongwith interest @ 9% there on.

5. This judgment and order passed on 22.1.2007 has been challenged by insurance company before this court under Section 30 of the Workmen Compensation Act, 1923 (now designated as Employees Compensation Act, 1923 and hereinafter referred to as ''Act''). This court while admitting this appeal on 11.5.2007 framed as many as five substantial questions of law which are as follows:

"1. Whether the learned Commissioner erred in law in holding the insurance company liable when admittedly on the date of occurrence, the claimant was taken by the driver of the bus in question on a casual basis as a handyman (cleaner) and no extra premium for such coverage was paid by the owner of the said bus?

2. Whether the learned Commissioner can assess the lost of earning capacity in absence of any certificate regarding loss of earning capacity issued by a qualified medical practitioner as required under the Workmen''s Compensation Act?

3. Whether the learned Commissioner below committed illegality in holding the Insurance Company liable to pay not only the awarded amount but also interest at the rate of 9% when the latter is not liable to pay interest?

4. Whether the learned Commissioner committed illegality in not absolving the appellants from any liability whatsoever and directing the owner to satisfy the entire award?

5. Whether the learned Commissioner below committed error in itself holding the disability percentage as 40% when the same was not assessed by a qualified medical practitioner/specialist/Board?"

6. I have heard Mr. S. Dutta, learned counsel for the appellant. He submits at the threshold that he will only urge the last substantial question of law and will not urge the first four substantial questions of law. Accordingly, substantial question of law Nos. 1 to 4 are hereby struck off and the appeal is taken up for hearing on the fifth substantial question of law referred to above.

7. Mr. S. Dutta, learned counsel would argue that the claimant did not lead any evidence to show that he has been permanently and partially disabled and under such circumstances, there is no material available on record to justify assessment of compensation under Section 4(1)(c)(ii) of the Act. Section-4(1)(c)(ii) itself is clear that assessment of compensation has to be proportionate to the loss of earning capacity of the workman owing to permanent injury and such assessment has to be made by qualified medical practitioner. Drawing attention of the court to the deposition made by CW-2 (Dr. Tapan Roy Choudhury), Mr. Dutta would argue that he did not make any mention as to the extent of physical disability and or loss of earning capacity of the workman. Thus, there is no material whatsoever to say that qualified medical practitioner had assessed the physical disability or the loss of earning capacity of the claimant. But while deciding Issue No. 4, the W.C. Commissioner has himself made the assessment of the jurisdiction of the medical qualified practitioner by making assessment of 40% disablement of the claimant without there being any material on records. Such finding of the W.C. Commissioner being not based on material and or in accordance with the requirement under Section 4(1)(c)(ii) of the Act, the impugned judgment and award is liable to be set aside. No one has put up appearance on behalf of the respondent although notices were duly served. I have perused the lower court records.

8. On perusal of the deposition made by CW-2 (Dr. Tapan Roy Choudhury), it appears that the said witness merely exhibited the documents like hospital discharge certificate (Exhibit-4), discharge certificate (Exhibit-6) etc. The Exhibit-7 is the prescription of GMCH, Exhibit-6 to 12, 13, 14 and 16 etc are also similar papers. He has also exhibited Exhibits No. 20 and 21 being his certificate wherein he has mentioned that claimant was unable to do any work. According to him, the injuries were beyond recovery.

9. In course of cross examination, he stated that he did not issue Exhibits-4 and

5 and that he has no personal knowledge concerning Exhibits-7 to 14. He said that while the claimant was in T.B. Hospital, claimant was under his treatment and this is how Exhibit-21 was issued. He also stated that Exhibit-21 was issued at the mere asking of the patient and on his claim that he had received injury in accident. On perusal of the examination-in-chief as well as cross examination of this witness, it does not appear that this witness was of any view as to the extent of physical disability of the claimant. He has not made any assessment regarding loss of earning capacity as well.

10. From perusal of the impugned judgment and award, it appears that there was no assessment by a qualified medical practitioner. But the W.C. Commissioner himself made the assessment and held that the claimant was disabled to the extent of 40% and that he had lost earning capacity to the same extent. Such finding of the W.C. Commissioner not being based on assessment by qualified medical practitioner cannot withstand the test of law. Section-4(1)(c)(ii) of the Act after amendment has set a clear guideline for assessing permanent and partial disablement of workmen. Although the W.C. Commissioner is the authority to make the assessment of compensation under Section 19 of the Act but statute has laid down the procedure as to how the assessment has to be made. Statute prescribes that assessment has to be made on the basis of assessment by a qualified medical practitioner. This presupposes that qualified medical practitioner will come to the witness box and he will not only prove the physical disability of the claimant but also certify that it is permanent and partial in nature. The permanent and partial disability of a claimant has to stand the test of Section-2(i)(g) of the Act which provides that the claimant must be unable to do the work in which he was capable at the time of the accident. In a catena of judgments, this court had already laid down the guideline that such assessment has to be made by examining the qualified medical practitioner and this should be based on objective satisfaction. In the case in hand, the W.C. Commissioner did not have any assessment of qualified medical practitioner before him in regard to permanent and partial physical disablement of the claimant and or his loss of earning capacity. This being the position, the sole substantial question of law is decided in favor of the appellant and against the claimant.

11. Accordingly, the appeal is allowed. The impugned judgment and award is hereby set aside.

12. At this stage, Mr. Dutta has drawn attention of the court to the order dated 2.4.2007 available on the lower court records which shows that whole of the compensation amount, namely, Rs. 88,401/- was deposited by the insurance company with the jurisdictional tribunal and the same had been released in favour of the workman on 2.4.2007. Under such circumstances, no meaningful purpose shall be served by sending back the appeal for re-trial as workman has already taken away the compensation money.

13. Be that as it may, the impugned judgment and award stands set aside. This means that the insurance company is not liable to make any further deposit.

However, considering the facts and circumstances, it is provided that the amount already disbursed to the workman shall not be taken back. The appeal stands allowed. No order as to cost.

