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Court : Karnataka

Decided On : Oct-28-2016

Judge : The Honourable Mrs. Justice S. Sujatha

Appeal No. : M.F.A.No. 5201 of 2013 [WC]

Appellant : Murthy @ Narasimhamurthy

Respondent : Salim and Another

Judgement :

(Prayer:This M.F.A. is filed under Section 30(1) of W.C. Act against the Judgment dated 30.10.2012 passed in WCA/Ban-2/NFC/CR-11/2010 on the file of the Labour Officer and Commissioner for Workmen Compensation, Sub Division-2, Bangalore, partly allowing the claim petition for compensation and seeking enhancement of compensation.)

1. This appeal is directed against the Judgment and Order passed by the Commissioner for Workmen s Compensation, Bangalore (Commissioner for short) in No.WCA/BAN-2/NFC/CR-11/2010 whereby the Commissioner has awarded compensation of Rs.2,30,568/- with interest at 12% p.a. after 30 days of the accident till the date of deposit.

2. Brief facts of the case are, on 12.1.2010 the appellant met with an accident arising out of and in the course of employment under 1st respondent while working as a driver in the bus bearing No.KA-01/A-1563. It transpires that the appellant

sustained grievous injuries in the employment accident, as a result of which his left leg was amputated on 25.2.2010. Based on these facts, compensation was claimed before the Commissioner.

3. The respondent No.2-insurer entered appearance and contested the claim. The Tribunal after analyzing the evidence on record, awarded the compensation of Rs.2,30,568/-. Being aggrieved, the claimant is in appeal.

4. The learned counsel appearing for the appellant/claimant contends that the Commissioner grossly erred in not appreciating the nature of the injuries sustained by the claimant, particularly, amputation of the left leg, to determine the loss of earning capacity for the injured driver. The doctor, who was examined as PW-2 specifically deposed that the appellant got 100% functional disability, but the Commissioner considered 50% as loss of earning capacity. Nextly, it was contended that as per Ex.P5 (DL), the appellant's date of birth is 13.4.1973, the accident had occurred on 12.1.2010, amputation of his leg was made on 25.2.2010, accordingly permanent disability occurred, the liability to pay compensation arose and fell due, as on the said date the appellant's age was 36 years 10 months and 12 days. In terms of explanation (I) to Section 4(1)(a) and (b) of the Employees Compensation Act, 1923, Act for short, to apply the relevant factor, the completed years of age of the employee on his last birthday immediately preceding the date on which the compensation fell due is the relevant date, accordingly the Commissioner could have considered the age of the injured as 36 years instead of 37 years and could have applied the relevant factor of 194.64 instead of 192.14 to compute the compensation.

5. It was further contended that the appellant had deposed before the Commissioner that he was earning Rs.12,000/- p.m, and his employer i.e. respondent No.1 herein deposed before the Commissioner that he was paying salary to the appellant at Rs.300/- per day besides Rs.100/- towards D.A. On considering this evidence, the Commissioner erred in restricting the salary for Rs.4,000/- p.m., which is contrary to Section 4(1)(b) of the Act, which specifies Rs.8,000/- of monthly wages. In support of his contention, the learned counsel placed reliance on the Judgment in the case of New India Assurance Co. Ltd.,

Bangalore v- N.Venkatesh and another reported in 2012 Kant. M.A.C. 649.

6. Per contra, learned counsel appearing for the insurer justifying the impugned Judgment and order submits that the claimant had suffered the scheduled injury as per the schedule I Part II, Serial No.20, percentage of earning capacity is fixed at 50, the same has been adopted by the Commissioner to assess the loss of earning capacity which cannot be found fault with. It is further submitted that the relevant factor employed based on the age of the injured as 37 years at the time of the accident is in terms of Section 4 of the Act. No error was committed by the Commissioner in applying the relevant factor of 192.14. It is further submitted that the determination of monthly wages made at Rs.4,000/- is in conformity with the provisions of the Act.

7. In view of the rival contentions urged and on perusal of the record, the substantial questions of law that arises for consideration in this appeal are:

i) whether in the facts and circumstances of the case, the Commissioner was justified in determining the monthly wages of the workman at Rs.4,000/-?

ii) Whether the Commissioner was justified in assessing the loss of earning capacity of the injured at 50% qua the assessment made by the doctor at 100% towards functional disability?

iii) Whether the Commissioner was justified in adopting the relevant factor of 192.14 considering the age of the workman/claimant as 37 years against the explanation (1) to Section 4(1)(a) and (b) of the Act?

8. The factum of accident and nature of injuries sustained by the appellant are not in dispute. The offending vehicle being covered by the insurance policy with the 2nd respondent is also not in dispute. The appellant had sustained grievous injuries and his left leg is amputated. The appellant was a driver by profession. The accident in question occurred when the appellant was working as a driver under the employment of respondent No.1. the doctor who was examined as PW-2, has deposed about the disability suffered by the appellant and has assessed 100% functional disability. Ex.P16 is the discharge summary, which discloses that the

appellant had taken treatment as an inpatient from 15.01.2010 to 22.03.2010 and his left leg was amputated below knee on 25.02.2010. Ex.P17 is the medical bills; Ex.P18 is the photograph of the appellant which shows the amputation of left leg below knee. In this factual matrix, it is beneficial to refer to the following Judgments to ascertain the loss of earning capacity of the injured.

(i) In the case of PRATAP NARAIN SINGH DEO vs. SHRINIVAS SABATA AND ANOTHER reported in 1976 ACJ 141, their lordships have considered the case of the carpenter who had suffered amputation of left arm from the elbow and it was held that, the same amounted to a total disablement as the injury was of such a nature that the claimant had been disabled from all work which he was capable of performing at the time of the accident. It has been held thus:

The expression total disablement has been defined in section 2(1)(l) of the Act as follows:

2(1)(l) total disablement means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement.

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

The injured workman in this case is carpenter by profession....By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only.

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to item 3 of Part II of Schedule I, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8

from tip of acromion to less than 4 1/2 below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established.

(ii) The Hon ble Apex Court in S.Suresh v- Oriental Insurance Co. Ltd. and another reported in 2010 AIR SCW 437 has held thus:

In our view, the ratio of the said judgment is squarely applicable to the facts at hand. We are of the opinion that on account of amputation of his right leg below knee, he is rendered unfit for the work of a driver, which he was performing at the time of the accident resulting in the said disablement. Therefore, he has lost 100% of his earning capacity as a lorry driver, more so, when he is disqualified from even getting a driving licence under the Motor Vehicles Act .

9. These judgments were followed by the co-ordinate Bench of this Court in Venkatesh s case (supra). Considering the profession/occupation of the injured appellant and the nature of the injuries, amputation of the left leg below knee, this Court is of the considered opinion that loss of earning capacity of the appellant can be determined at 70%.

10. On perusal of the date of birth as per the DL at Ex.P-5, the age of the injured was 36 years 10 months and 12 days. Explanation (1) to Section 4(1)(b) contemplates for the purposes of determining the relevant factor, the completed age of the employee on his last birthday immediately preceding the year on which the compensation fell due is relevant. Applying the same, the age of the deceased has to be construed as 36 years and the relevant factor would be 194.64. In view of the functional disability assessed by the Doctor at 100%, and the loss of earning capacity assessed by the Commissioner at 50%, to strike a balance between the two, particularly considering the loss of earning capacity prescribed under Schedule I to Part-II of the Act, coupled with the profession of the injured as a driver, 70% loss of earning capacity if determined would meet the ends of justice.

11. The accident in question, admittedly occurred on 12.1.2010. Section 4(1)(B) of the Act was inserted by Act 45/2009 w.e.f. 18.1.2010. The Central Govt. has specified, for the purpose of Subsection 1 of Section 4 of the Act, Rs.8000/- as

monthly wages, vide S.O. 1258 (E), dated 31.5.2010 w.e.f. 30.1.2010. As such, the said amended provision is not applicable to the facts of the present case. The monthly wages determined at Rs.4,000/- cannot be found fault with.

12. The substantial questions of law are answered accordingly. Thus, applying the relevant factor 194.64 with monthly wages of Rs.4,000/- and the loss of earning capacity of 70%, the total compensation works out to Rs.3,26,995/- (Rs.4000 x 60% x 194.64 x 70%). The appellant shall be entitled to Rs.3,26,995/- as against Rs.2,30,568/- awarded by the Commissioner with interest at 12% p.a. after 30 days of the accident till the date of deposit.

In the result, the appeal is disposed of in terms of the above.

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