

Executive Engineer, Pwd, (B and R) Vs. Narain Lal

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Court : Rajasthan

Decided On : Jan-25-1977

Reported in : (1978)ILLJ141Raj; 1977()WLN101

Judge : P.D. Kudal, J.

Appellant : Executive Engineer, Pwd, (B and R)

Respondent : Narain Lal

Judgement :

P.D. Kudal, J.

1. This is an appeal under Section 30 of the Workmen's Compensation Act against the award of the Workmen's Compensation Commissioner, Udaipur, dated July 31, 1975.

2. The facts of the case relevant for the disposal of this appeal are that Narain Lal was working as a motor driver in the office of the Executive Engineer, Udaipur, The applicant has contended that on April 6, 1971 he received personal injuries in the accident which occurred in the course of his employment. The jeep in which the applicant was going had turned over and as a result thereof the applicant received several serious injuries in his head and the collar bone was broken. The monthly wages which the applicant was receiving at the time of the accident were Rs. 258. It was contended that as the respondent had not made any payment of

compensation to him payable under the Act, he has filed an application claiming payment of compensation to the extent of Rs. 11,500.

3. The opposite party, however, denied the claim of the applicant stating that the applicant was not in the employment of the opposite party on April 6, 1971. It was also contended by the opposite party that the minor injuries received by the applicant were not covered under Schedule I of the Workmen's Compensation Act. It was also contended by the opposite party that the applicant has not suffered any loss due to this accident as he has resumed duties after having obtained a medical certificate of fitness for resuming duty. It was also contended that the applicant was given leave on full pay during the time he was under treatment, and after resuming his duty, the applicant is doing the same job which he used to do before the accident, and that if the accident has resulted in any incapacity to the applicant still the applicant is being paid his full salary. Thus, the applicant was not incapacitated in his earning. The learned Compensation Commissioner struck the following issues:

1. Whether the injuries to the workmen during the course of the employment resulted into permanent total disablement?

2. Whether the injuries caused to the workman due to negligence of the workman himself?

3. To what amount workman is entitled to for compensation under the Workmen's Compensation Act, 1923?

4. Relief?

4. On behalf of the applicant, apart from himself, Shri S.L. Joshi, Executive Engineer, Indar Lal Tak. AEE, Dr. R.P. Bajaj and Dr. Madan Mohan Sharma were examined. The opposite party did not examine any witness, but produced certain documents. After recording the evidence of the parties, the learned Compensation Commissioner came to the conclusion that the opposite party should pay Rs. 4,480 within 30 days to the applicant. The costs were also allowed.

5. The State feeling aggrieved against the award of the learned Workmen's Compensation Commissioner has come up in appeal before this Court.

6. On behalf of the State, it was contended that the applicant has failed to establish his permanent disability and the extent of incapacity in work and. as such, he is not entitled to any amount under the Workmen's Compensation Act. It was also contended that the learned Compensation Commissioner has erred in law in allowing Rs. 4,480 and costs to the applicant. The learned Counsel for the State contended that there is no sufficient material on the record on the basis of which an inference could be warranted that there has been a permanent disability and that the workman has been incapacitated entitling him to the compensation claimed. Reliance was placed on Calcutta Port Commrs. v. Prayag Ram : (1967)IILLJ302Cal ; Cal. E.S. Corporation v. Habul Chanel'a : (1968)IILLJ769Cal ; P.E. Davis and Co. v. Kesto : (1968)IILLJ393Cal ; Maharashtra Sugar Mills v. Ashru Jaiwant : AIR1966 Bom240 and Sewa Singh v. Indian Hume Pipe Co. A.I.R. 1964 Punj 512

7. On behalf of the applicant respondent, it was contended that the appeal filed by the State is not maintainable as no substantial question of law is involved in this appeal as contemplated under Section 30 of the Workmen's Compensation Act. Reliance was placed on G.R. Sane v. D.S. Sonavone & Co. A.I.R. 1946 Bom. 110 and Alimohammed v. Shankar A.I.R. 1946 Bom. 169.

8. It was also contended that the ratio decidendi laid down in Calcutta Port Commrs. v. Pravaz Ram : (1967)IILLJ302Cal , has been reconsidered and diluted in Ram Naresh v. Lodhna Colliery Co. (1973) Lab IC 1956 (Cal). It was also contended that the applicant and the opposite party had agreed to abide by the opinion of the Medical Board which may examine the applicant and declare the percentage of disability, as is evident from the proceedings dated August 27, 1974. Attention was also invited to the certificate issued by the Medical Board stating that the applicant Narain Lal was examined on January 8, 1974 He is a case of old injury cervical-spine with weakness of limbs. He still has got pain and limitation of movements of neck and weakness in the left limbs. He has got 50% disability for the job of a driver which is likely to improve further with treatment.

9. The respective contentions of the learned Counsel for the parties have been considered and the record of the case carefully perused. Shri S.L. Joshi, Executive Engineer, states that the accident took place on April 6, 1971. He himself was sitting in the jeep. The jeep overturned near the airport. He has further stated that the applicant was on duty on that date. Indarlal AEN has stated that the applicant Narain Lal was a driver in the jeep. Shri Ashok Kumar, Executive Engineer was driving the jeep. Dr. R.P. Bajaj has stated that as a result of the accident the applicant received injuries on his neck, that the applicant had become unconscious for sometime and that even after regaining consciousness the applicant could not raise his left arm. The applicant received injuries on the skull and on the spinal cord. Dr. Bajaj has also issued a disability certificate in which he has shown the disability in the left upper extremity as 72.5% and on the left lower extremity 22.5%.

10. On examination the Medical Board came to the conclusion that the disability was 50%. The learned Government Advocate has contended that from the evidence on record it has not been established that there was loss of earning capacity. Reliance has been placed on *Calcutta Port Commrs. v. Prayag Ram* : (1967) IILLJ302Cal . In this case, it was observed that, 'The physical defect if occurs as a result of the accident may not in fact reduce his capacity to do work, but if as a result of disfigurement or otherwise it makes his labour unsaleable to any market reasonably accessible to him, then also there will be a diminution of loss in the earning capacity, 'Incapacity for work' is not the same thing as 'incapacity to work'. It means the loss or diminution of wage-earning capacity and it includes inability to work if that be the result of the accident. It was further observed that there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch. It is clear, therefore, that the loss of 'earning capacity' is a issue of fact which must be proved by evidence of physical injury resulting in a loss of earning capacity. In the instant case, it was held that there was permanent disablement of the medial cuneiform bone, In the absence of other evidence it does follow that there will be a diminution in the earning capacity of the workman concerned. This Court has repeatedly pointed out that this issue cannot

be decided upon medical evidence only. The utmost a medical witness can give by way of a percentage is to give the percentage of the loss of the normal physical capacity or power. 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. The learned Commissioner, therefore, was altogether wrong in taking the evidence of the medical witness not only as relevant but as decisive on the question of the loss of earning capacity'.

11. In *Sewa Singh v. Indian Hume Pipe Co.* A.I.R 1964 Punj. 512, it was observed that in assessing compensation under Section 4(1)(c)(ii) the loss of earning capacity of a workman as a result of his permanent total disablement has to be taken into consideration and indeed the compensation has to be made proportionate to the loss of earning capacity. It was further held that where a workman after his permanent total disablement due to an accident, was continuously employed to do the same work which he was doing before the accident and received his full wages as well as increments, which had accrued since the time when he was discharged from the hospital, it was held that there was no loss of earning capacity and hence the workman's claim for compensation under Section 4(1)(e)(ii) was not maintainable.

12. In *P.E. Davis & Co. v. Kesto* : (1968)11LLJ393Cal , it was held that the principle underlying is that an act which is reasonable and necessary, having regard to all the circumstances, though not one which is part of the workman's original duty may be within the sphere of his employment. What is necessary is that there should be a casual connection between the accident and the employment and further that the cause should be a proximate cause and not a very remote cause. But at the same time if a workman in the course of his employment has to be in a particular place and by reason of his being in that particular place has to face a situation in which he receives injuries that fact itself would be a sufficient casual connection between the employment and the accident. It was further held that in case of injuries in the course of employment the compensation has to be awarded in proportion to the percentage of loss of earning capacity. There are certain scheduled injuries in regard to which the percentage of loss of earning capacity has been statutorily fixed so that in those cases the Commissioner has only to

refer to the appropriate schedule and find out the quantum of compensation that has to be awarded to the workman. But 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 Workmen's Compensation 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 the paramount thing that the Commissioner has to consider is the loss of earning capacity. Diminution of physical powers or any disablement of the body would in most cases affect the efficiency of the workman and also adversely affect his earning capacity but there is no arithmetical relation between the amount of disability and the amount of diminution in earning capacity in such cases. Everything will depend on the nature of work that a workman has to do, the nature of the injury as well as on other environmental circumstances.

13. In *Cal E.S. Corporation v. Habul Chandra* : (1968) 11 LLJ 769 Cal , it was held that loss of earning capacity has to be proved as a fact. Medical evidence of physical disability alone is not sufficient. Loss of physical capacity cannot be equated with loss of earning capacity. Where workman claims compensation in respect of an injury which is not scheduled injury, the loss of earning capacity cannot be proved by mere medical evidence. It must be proved by evidence which will establish that the workman was, as a result of the injury unable to earn as much as he did before. This being a question of fact it has to be proved by the evidence like any other questions of fact.

14. In *Maharashtra Sugar Mills v. Ashru Jaiwant* : AIR 1966 Bom 240 , it was held that medical certificate deals only with physical incapacity. Court should take into account the nature of injury, the nature of work which the workman was capable of undertaking and its availability to him. The Court need not follow the medical opinion.

15. The learned Counsel for the applicant-respondent placed reliance on *All Akbar v. Java Bengal Line*, Calcutta A.I.R. 1937 Cal. 697, wherein it was held that where in a case under the Workmen's Compensation Act the Commissioner took a recourse to the services of the medical expert whom he called to assist in the

adjudication and the examination by such expert took place in the presence of the Commissioner, the opposite party and the applicant's pleader but the applicant's pleader not only did not raise any objection as to procedure but actually acquiesced in it. In this case, it was held that the applicant could not raise any objection in appeal.

16. The learned Counsel for the applicant-respondent also placed reliance on *Ram Naresh v. Lodhna Colliery Co.* (1973) L.L.C. 1656 (Cal), wherein it was held that in considering the loss of earning capacity in the case of a 'permanent partial disablement' the comparison between the wages drawn by the workman before and after the accident from his employer at the time of the accident is not a decisive factor. What has to be found out is the reduction in earning capacity suffered by the workman in every employment which he was capable of undertaking at the time of the accident. This has necessarily to be a notional figure for which it is not possible for the workman to give precise factual evidence. In fact, this notional assessment of loss in earning capacity with regard to every possible employment is the task of the Judge who, in such cases, is the Commissioner for the Workmen's Compensation. In certain cases, of course, it may be possible to adduce some evidence on facts to help the assessment. But it is not possible that assessment of such a notional loss can always be made purely on the basis of factual evidence. It was further held that the following principles may be kept in view while assessing loss in earning capacity:

1. Earning is not the same as earning capacity.
2. Rise in earning may be because of various factors and rise in wages is not, therefore, decisive proof that there is no loss of earning capacity.
3. Loss of physical capacity is not coextensive with loss of earning capacity.
4. Loss of physical capacity or physical incapacity may be relevant in assessing to what extent there is loss of earning capacity from 'every employment' which the workman was capable of undertaking at the time of the accident or re-employment in which he was engaged at the time.

17. It was further observed, 'The fact that he is still holding his old post and getting his old wages is because his employer is giving it to him by way of grace. It would be a complete misunderstanding of the Workmen's Compensation Act to hold that in such circumstances, the workman will not be entitled to any compensation. This was not certainly the intention of our judgment in : (1967)IILLJ302Cal .'

18. In the instant case, it has to be observed that there has been a permanent partial disability of the applicant. Neck has become stiff and is incapable of free movements. There is disability in the spinal cord also. The question is whether because of this disability the applicant has suffered any loss in the earning capacity. He is continuing in the same employment with all its benefits and normal increments. The learned Counsel appearing on behalf of the State has strenuously argued that the applicant has suffered no loss in earning capacity, because even if no accident had taken place, or if no injury had been caused to the applicant, then too he would have drawn the same salary and would be entitled to the same benefits which he is at present availing of. On the other hand, the learned Counsel for the applicant-respondent has contended that the name of the applicant is continuing in service is hardly of ' any consequence. Under the scheme of the Workmen's Compensation Act, the Court has to see whether as a result of the injuries received any permanent disability has been caused to the applicant causing loss in the earning capacity. It was also contended that if by an act of mere grace the applicant is continued in service it does not mean that he has not suffered any loss in the earning capacity and that because he is continuing in service he is not entitled to the compensation payable to him under the Workmen's Compensation Act.

19. Having given my most anxious consideration to this aspect of the case, I have no hesitation in holding that the loss in the earning capacity has to be calculated in terms of the permanent partial disability to which the applicant has been subjected to. In computing the loss in the earning capacity the Court may take into consideration the] medical evidence or such other evidence on the basis of which the Court can come to a conclusion. The view taken by their Lordships of the Calcutta High Court in Calcutta Port Commrs. v. Prayag Ram : (1967)IILLJ302Cal has not been adhered to in Ram Naresh v. Lodhna Colliery Co. (1973) L.I.C. 1656

(Cal). The theme in the Workmen's Compensation Act is to provide security to the workman who receives partial incapacity resulting in a loss in the earning capacity. The protection so afforded to the workman is independent of the acts of grace or mercy which the employer might show to him. In a welfare State like ours, the protection afforded to a disabled workman can not be allowed to rest on the mercies and grace shown by the employer. If the employer does so, it is commendable, but the workman has still a stake for his employment which is guaranteed to him under the Workmen's Compensation Act. Under these circumstances, I am in respectful agreement with the view propounded in *Ram Naresh v. Lodhna Colliery Co.*

20. In the instant case, the appellant has not led any oral evidence; The case was referred to a Medical Board with the full consent of the appellant. The appellant having acquiesced and agreed to abide by the result of the Medical Board, cannot, now, be permitted to turn round and say that the result arrived at by the Medical Board should not be adhered to. Apart from the Medical evidence of Dr. Bajaj and the Medical Board the evidence of Narain Lal is also on the record. The extent of loss in the workman's capacity has to be calculated by the Commissioner under the Workmen's Compensation Act having regard to all the facts. It would rather be extremely difficult for any workman to lead precise evidence as to what extent he has suffered loss in the earning capacity.

21. Looking to all the facts and circumstances of the case, I feel that no case has been made out for any interference in the award given by the Compensation Commissioner.

22. For the reasons stated above, there is no force in this appeal, which is hereby dismissed.