

The Branch Manager Vs. K.Thangam

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Court : Chennai

Decided On : Apr-11-2012

Judge : K.B.K.Vasuki, J.

Acts : Workmen Compensation Act - Section 19, 4(1) (c), 20(3)

Appeal No. : C.M.A.(MD)No.672 of 2008 and Cross objection (MD) No.23 of 2008

Appellant : The Branch Manager

Respondent : K.Thangam

Advocate for Def. : Mr.S.Harihara Ramachandran, Adv.

Advocate for Pet/Ap. : Mr.A.K.Baskara Pandian, Adv.

Judgement :

PRAYER Civil Miscellaneous Appeal and Cross objection are filed, against the award, dated 11.02.2008, made in WC.No.175 of 2006 on the file of the Deputy Commissioner for Workman Compensation, Dindigul.

COMMON JUDGMENT

1. While CMA is filed by the 2nd respondent insurer against the award of compensation in favour of the claimant, the Cross objection is filed by the claimant for enhancement of compensation.

2. The parties are referred to as per their rank in the claim petition.

3. The facts which are relevant for consideration herein are as follows : The claimant at 12.30pm on 02.12.2005 travelled in a mini lorry bearing Registration No.TN.57-D-3499 belonging to the 1st respondent and insured with the 2nd respondent along with soap material and one state transport corporation bus bearing Registration No.TN01-N-6196 was going in front of the same and the state transport bus driver suddenly stopped the bus, as a result, the mini lorry, which was going behind the bus dashed against the transport corporation bus, due to the impact of which, the claimant sustained multiple injuries and fractures in various parts of his body. Thereafter, the claimant underwent treatment in Perambalur Government Hospital and Kaveri medical centre at Trichy as inpatient and he underwent major and minor operations and iron plates were implanted. Because of the seriousness of the injuries sustained by him, he incurred permanent disability and has been continuously undergoing treatment. Thereafter, the claimant approached the Commissioner for workmen compensation claiming compensation of Rs.10,00,000/- on the ground that he travelled in the lorry as cleaner and he sustained injury during the course of employment and his employer and the insurer of the vehicle are jointly and severally liable to pay compensation to him. As the vehicle was insured with the 2nd respondent/insurer, the insurer was also impleaded as 2nd respondent in the claim petition. The 1st respondent employer-cum-owner of the lorry did not contest the claim petition. Whereas, the claim petition was contested by the 2nd respondent insurer by denying the employer employee relationship between the parties and by denying the capacity in which the claimant travelled in the vehicle at the time of accident. According to the 2nd respondent, the claimant travelled in the vehicle as gratuitous passenger in breach of policy condition and the same absolves the insurer from its liability to indemnify the insurer in respect of 3rd party insurance.

4. The claimant and the 2nd respondent insurer adduced oral and documentary evidence in the course of trial before the Commissioner for Workmen compensation. The learned commissioner accepted the claim petition and awarded compensation of Rs.2,60,279/-. Aggrieved against the award and quantum of compensation made, the insurer/2nd respondent and the claimant has

preferred the present CMA and the cross objection respectively before this court.

5. The common substantial questions of law arises in the CMA and the cross objections are :

1. Whether the learned commissioner has jurisdiction to try the claim under workmen compensation act.

2. Whether the finding of the learned commissioner that the claimant is cleaner is based on satisfactory evidence.

3. Whether the learned commissioner has grossly erred in not treating the claimant as gratuitous passenger.

4. Whether two claims one on the strength of personal accident coverage and another for compensation under Workmen Compensation Act are independently maintainable. 5. Whether the learned Commissioner has authority to fix the extent of earning capacity on his own by overlooking the assessment of the qualified Doctor, contrary to the procedure laid down under Sec.4(1)(c)(ii) of Workmen Compensation Act.

6. The fact that the claimant was travelling in the vehicle at the time of accident is not denied. It is also not denied that the claimant is an employee under the 1st respondent at the time of the accident. What is denied is the capacity in which he is employed under 1st respondent employer and the capacity in which the claimant travelled in the vehicle at the time of the accident. While according to the claimant, he travelled in the vehicle as cleaner of the lorry along with goods, according to insurer, he is only a staff attached to the 1st respondent office and he cannot be treated as cleaner whose nature of the duties is different from that of the staff, as such, the presence of the claimant inside the vehicle at the time of the accident is in no way related to the nature of his employment. Hence, his presence inside the vehicle at the time of the accident is to be construed as gratuitous passenger and not an employee of the 1st respondent.

7. The claimant has both in his claim petition and in the witness box claimed himself to be a cleaner of the lorry and he is also referred to as cleaner in Ex.P1

FIR. The learned counsel for the respondent insurer relied upon Ex.R2 claim form, Ex.R3 Rasta Apatti Kavach-group insurance policy for personal accident coverage for 62 unnamed staff and employees, Ex.R4 claim disbursement voucher to the tune of Rs.1,00,000/- in support of their contention that the claimant is only a staff and not cleaner. It is true that EX.R2 mentioned the claimant as staff. It is not in dispute that Ex.R2 is made on the basis of Ex.R3 group insurance policy relating to the claim under personal accident coverage, which is different from the claim made under Workmen Compensation Act . In my considered view, the particulars entered in Ex.R2 does in no manner advance or improve the case of the insurer herein.

8. As already referred to, the claimant is admittedly one of the employees of the 1st respondent/employer. The group insurance is taken in respect of unnamed staff and employees. The term "staff" as per the dictionary meaning is one of the employees and it does not denote any particular designation in the usual practice, as such, the expression 'staff' is wider enough to cover cleaner for the purpose of deciding any claim under the Workmen Compensation Act, which is benevolent in nature.

9. It is also not out of place to mention at this juncture that the employer and employee relationship between the 1st respondent and the claimant and the nature of the employment of the claimant is not denied by the 1st respondent employer. The 2nd respondent/insurer also in the statement of objection filed by them did not specifically deny the nature of employment of the claimant. The objection raised therein is only to the effect that he is not a cleaner but he was only a gratuitous passenger. That being so, the objection raised by the insurer is devoid of any merits.

10. The finding of the learned commissioner that the claimant was employed under the 1st respondent and travelled in the vehicle at the time of accident as cleaner deserves no interference. The substantial questions of law 1 to 3 are accordingly answered in favour of the claimant.

11. Once the claimant is held to be employee, the learned commissioner under Section 19 of the Workmen Compensation Act has jurisdiction to settle any

question raised in any proceedings under this Act as to the liability of any person to pay compensation or as to the amount or duration of compensation including any question as to the nature or extent of disablement and the questions shall, in default of agreement, be settled by the commissioner.

12. It is not in serious dispute that two policies are taken to cover the risk in respect of employees (i) group insurance i.e, rasta appati kavach (road safety insurance) and (ii) package policy insurance Ex.R3 is the copy of group insurance policy. Though the copy of the package policy is not produced herein, RW1 who is employed as development officer under the 2nd respondent insurer has in the course of his cross examination categorically admitted that there is one more insurance policy i.e, package policy having policy No.720900/31/05/01/00003706 for Rs.8408/- as premium out of which, Rs.50/- is received in respect of risk of two employees. RW1 has also deposed about the disbursement of the claim under group insurance & personal accident coverage. However, the disbursement of claim under group insurance does not render the claim under the Workmen Compensation Act to be rejected as not maintainable.

13. The learned counsel for the claimant in support of such contention relied upon the judgment of Karnataka High Court and Rajasthan High Court reported in (1) 2001 ACJ 126 Karnataka High Court (National Insurance Co. Ltd., V. Sarojini and others) (ii) 2010 (2) TAC 266 Rajasthan High Court (New India Assurance Co. Ltd., V. Smt. Bidami and others), wherein it is held that the same does not amount to duplication of compensation, but it involves two sets of compensation, which are payable virtually under two different heads under the same policy.

14. In the case decided by the Karnataka High Court, there was additional coverage in motor insurance policy in respect of the death of a passenger travelling in a private car on payment of additional premium, when the insurance company of the car paid sum of Rs.1,00,000/- under such separate clause in the policy and when the question arose as to whether the amount received under additional coverage is deductible from the compensation payable under Motor Vehicle Act. The same is answered in negative on the ground that the amount payable under the head of additional coverage is independent and distinguishable

and separate from the compensation payable under the main body of the policy.

15. In the case decided by Rajasthan High Court, there were two claims made one before the Motor accident claims tribunal and another before the Workmen Compensation Act. The claim before the tribunal is against third party tort-feasor, whereas the claim before the learned commissioner under Workmen Compensation Act is against the employer who are different parties. When the maintainability of two claims arising out of the same accident before two forums was questioned, the same is held in favour of the claimant by the learned Commissioner. The correctness of such order was challenged before the Gujarat High Court. The same after referring to the observations of various High Courts and Supreme Court finally rendered its decision in para 22 to 24 in favour of maintainability of two claims under two different enactment against two different parties i.e. employer in one case and tort-feasor other than the employer in other case. The Rajasthan High Court held at page 281 of its judgment that in such cases where the tort-feasor and the employer happened to be one and the same person, the workman or the claimant has to exercise his option, namely, he can either proceed against the tort-feasor before the Accident Claims Tribunal or he can proceed against the employer under the provisions of the workmen's compensations Act. It is held so, by relying upon the decision of the Supreme Court in 1993 Supp. (4) SCC 100 in Regional Director V. Francis De Costa.

16. Applying the same legal principles herein, the claims are to be treated to be under two different coverage. The claim, if any, received under group insurance policy is by way of additional personal accident coverage and the claim made herein is under the Workmen Compensation Act by invoking the legal liability in respect of risk of employees covered under the main policy and both claims are distinct and separate, as such the objection regarding the maintainability is liable to be negatived and next substantial question of law is hence answered against the insurer.

17. The next aspect to be considered is the mode of assessment of permanent disability and proportionate loss of earning capacity. The relevant provision of law under Workmen Compensation Act prescribing mode of computation of amount of

compensation for death, permanent total disablement, permanent partial disablement, etc. is Section 4 and Section 4(1) (c) along with Explanation II is relevant for deciding the present issue. Section 4 prescribes the mode of compensation both for schedule and non schedule injuries. Admittedly, the injuries sustained by the claimant herein is non schedule injuries as such the correct provision of law applicable herein is Section 4(1)(c)(ii) and Explanation-II which is extracted as follows:

Section 4(1) (c) (ii) (c) Where permanent partial(i) in the case of an injury disablement results from specified in Part II of Schedule I the injury 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. Explanation I - where more injuries than one are caused by the same accident,the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries. Explanation II - In assessing the loss of earning capacity for the purpose 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;

18. As per the relevant provisions of law, the percentage of compensation payable in the case of permanent total disablement proportionate to the loss of earning capacity and the loss of earning capacity shall be assessed by the qualified medical practitioner.

19. The issue as to whether the loss of earning capacity shall be assessed only by the qualified medical practitioner and as to whether the learned commissioner is empowered to assess the same on his own without the assistance or overlooking the assessment of the qualified medical practitioner arose for consideration before

the Supreme Court, our High Court and various High Courts. The question as to whether the percentage of disablement can be coextensive with the loss of earning capacity in all situations and as to whether loss of earning capacity depends upon the injury and the nature and character of the avocation of the workman and whether medical evidence though relevant cannot be a decisive factor, came up for consideration and the same is answered by the High Court of Kerala (Division Bench) and Karnataka (Full Bench) in the following cases (i) 1993 ACJ 1035 Kerala High Court United India Insurance Co. Ltd. and others V. Sethu Madhavan and others; (ii) 2004 (2) TNMAC (FB) Karnataka 422 Shivalinga Shvangowda Patil V. Erappa Basappa Bhavihala; and (iii) 2006 ACJ 775 Andhra Pradesh High Court National insurance CO. Ltd., V. M. Shyam Prasad and another.

20. In all the three cases, it is observed that the percentage of physical disability and percentage of loss of earning capacity need not be the same and that the permanent disability is not equivalent to the percentage of loss of earning capacity. It is held by the Kerala High Court that the loss of earning capacity 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 avocation of the workman at the time when he sustained the injury. It is further observed that 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 of another avocation.

21. All the three cases cited above and other cases of the Supreme Court and the High Courts of Madras, Kerala, Andhra Pradesh, Karnataka and Bombay as cited below. 1. 2007 1 TNMAC 214 (SC) National Insurance Co Ltd., V. Mubasir Ahmed and another; 2. 2010 1 TNMAC 161 Madurai Bench New India Assurance Co. Ltd. V. Murugesan and Abbas; 3. 2006 1 TNMAC 237 Bombay High Court New India Assurance Co. Ltd., V. Suresh Pandurang Shinde and another; and 4. 2010 ACJ 1593 Andhra Pradesh High Court New India Assurance Co. Ltd., V. A. Narsimhulu and another have dealt with the issue relating to assessment of loss of earning capacity by the qualified medical practitioner.

22. The Supreme Court has in paras 7 to 9 of its judgment in 2007 1 TNMAC 214 (SC) held that in cases relating to non schedule injuries, the qualified medical practitioner has to assess the loss of earning capacity having due regard to the percentage of loss of earning capacity in relation to the different injuries in schedule I..... Para 8 (ii) Loss of earning capacity is therefore not a substitute for percentage of the physical disablement. It is one of the factors taken into account..... para 9 (iii)the adjudication under Section 4 in some cases involves the assessment of loss of earning capacity by a qualified medical practitioner.

23. Our High Court in 2010 1 TNMAC 161 Madurai Bench has in para 8 by relying upon the Supreme Court judgment above referred to and full bench of Kerala High Court reported in New India Assurance Co.Ltd., V. Sreedharan in 1995 ACJ 373 held that the loss of earning capacity must be fixed by the Doctor. In the case decided by the High Court, PW2 Doctor has assessed only permanent disability and has not spoken about the loss of earning capacity, as such the High Court is pleased to remand the matter to the learned commissioner for reassessing the loss of earning capacity by giving opportunity to both parties to examine doctor to speak about the loss of earning capacity.

24. The Kerala High Court in para 15 of its Judgment in 1993 ACJ 1035 observed that 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, and Explanation II only gives guidelines to the medical practitioner in assessing the percentage of loss of earning capacity and he is entitled to give his opinion as to the loss of earning capacity and its probative value has to be judged with due regard to the injury, its effect and the nature of the work in which the workman was engaged. It is further observed that under Section 20(3) of the Act the commissioner may for the purpose of deciding any matter referred to him for decision under this Act, avail the assistance of any person possessing special knowledge to adjudicate the matter in issue before him as such 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 and in appropriate cases the commissioner even suo-moto can

refer the workman to the medical expert for such opinion.

25. In the judgment reported in 2003 (2) MLJ 352 (Division Bench) The New India Assurance Company Ltd, Mettupalayam V. Tmt.Ponnammal and others our High Court has in paras 17 and 18 held in assessing the compensation in respect of non schedule injuries, the most important and paramount thing that the commissioner has to consider, is the loss of earning capacity having regard to (i) the nature of the work that a man has to do (ii) nature of injury and (iii) other environmental circumstances. It is further observed that as loss of physical capacity is not coextensive with loss of earning capacity and vis- versa, Medical evidence by itself is not conclusive or decisive factor of the loss of earning capacity. It can only establish the nature of disablement or the physical injury. But to what extent the physical disablement causes loss of physical capacity is not for medical evidence to state. It is question of fact and has to be proved by evidence like any other question of fact and the same depends upon the factual materials placed before the authority.

26. The Full Bench of Karnataka High Court in 2004 2 TNMAC (FB) KARNATAKA 422 held in paras 14 and 15 laid down that in the case of non specified injuries, the compensation payable by the employer would be on the basis of assessment made by the qualified medical practitioner regarding the disability and loss of earning capacity..... In settling the dispute, the commissioner cannot completely ignore the assessment made by the medical practitioner, and if the said assessment is disputed, the commissioner has to find out whether the nature and extent of disablement assessed by the medical practitioner is just and proper and then come to the conclusion, whether the assessment made by the qualified medical practitioner is to be accepted or not. It is also open to him to have second opinion from the qualified medical practitioner, it cannot be said that the assessment made by the qualified medical practitioner is final and sacrosanct..... It is not open to the commissioner to say that as he is bound by the assessment of loss of earning capacity made by the qualified medical practitioner, he will not go into the correctness or otherwise of such assessment. If any one of the parties were to contend that the assessment made by the qualified medical practitioner is not correct, it is in view of the aforesaid provisions commissioner is bound to frame

an issue to that effect and, on the basis of the evidence adduced for and against the said issue, is bound to pronounce his decision..... Therefore, it is clear that the assessment made by the qualified medical practitioner is only in the nature of an expert evidence given and the commissioner is to determine the amount of compensation payable.

27. The Andhra Pradesh High Court has in para 11 in 2006 ACJ 775 held that after the medical evidence as to the nature and measure of the physical infirmity is collected the substance of such evidence is to be taken over and applied in the assessment of loss of earning capacity, as one of the factors and may be the principal factor..... It is always open for the commissioner to assess loss of earning capacity having due regard to the medical evidence on record.....

28. The Bombay High Court has in para 16 onwards in 2006 (1) TNMAC 237 observed that after amendment of Section 4, by amending Act No.22 of 1984 assessment of loss of earning capacity, in case of non scheduled injury is to be computed with the assistance of qualified medical practitioner. If it is disputed it could be settled by the commissioner. While awarding compensation under Section 4(1)(c)(ii) of the Act the learned commissioner for workmen compensation has to assess the loss of the workman's earning capacity resulted by the accident and not simply his loss of physical capacity..... The learned commissioner for Workmen's Compensation shall not straight away conclude that the loss of earning capacity of the workman concerned is equal to the percentage of partial or total physical disablement. The commissioner has to assess the incapacity of the workman concerned with reference to the work or job, the workman concerned was doing at the time of accident and for all work which he was capable of performing at the time of the accident, resulting in such disablement. The High Court of Bombay has in para 18 referred to the observation of the Full Bench judgment of Karnataka High Court to the effect that the commissioner under the Workmen's Compensation Act cannot assess the loss of earning capacity without the assistance of the assessment made by the qualified medical practitioner regarding loss of earning capacity or in disregard of the assessment of a qualified medical practitioner.

29. The Andhra Pradesh High Court in 2010 ACJ 1593 extracted para 9 the judgment of Supreme Court in Mubasir Ahamed case as cited above which speaks about the adjudication under Section 4 through assessment of loss of earning capacity by a qualified medical practitioner and award of interest from the date of such adjudication.

30. Our High Court in the unreported judgment of learned Single Judge Justice C.S.Karnan in New India Assurance CO.Ltd., V. Jeevanandam and another has in para 11 arrived at a conclusion that the commissioner has to assess the loss of earning capacity of the workman according to medical report and Medical evidence by itself is not conclusive and decisive factor in the loss of earning capacity. It can only establish the nature of disablement or extent of physical injury. But, to what extent the physical disablement causes loss of earning capacity is not for medical evidence to state. It can be decided only by the commissioner on the basis of his own estimate of the workman's possibilities of employment in the open labour market.

31. The principles laid down by the Supreme Court and the High Courts of Andhra Pradesh, Bombay, Chennai, Karnataka and Kerala in the judgments above cited, can be now summarised as follows : 1.In assessing the compensation in respect of non-schedule injuries, the most important and paramount thing to be considered is the loss of earning capacity, having regard to (i)the nature of work, the man has to do (ii) nature of injury and (iii) other environmental circumstances 2.the loss of physical disability is not coextensive with loss of earning capacity and vis-versa. 3.Loss of earning capacity has inexorable nexus with the type of profession of the workman, as such, 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.

3(a). The loss of earning capacity is a question of fact and the same has to be proved by evidence like that of any other question of fact.

3(b). The Commissioner is bound to frame an issue to the effect and bound to pronounce decision based on the evidence adduced for and against the said

issue. 6. In cases relating to non schedule injuries covered under section 4(1)(c)(ii) in terms of explanation II, the qualified medical practitioner has to assess the loss of earning capacity having due regard to the percentage of loss of earning capacity relating to different injuries in schedule I 7. The medical evidence is though the principal factor, not the decisive factor and is not final and sacrosanct. It is only an expert opinion about the nature of disablement or extent of physical injury. But to what extent, the physical disablement causes loss of earning capacity is not for medical evidence to state. 5(a). While doing so, the commissioner shall not straight away conclude that the loss of earning capacity of the workman concerned is equal to the percentage of partial or total physical disablement.

9. The commissioner cannot say that he is bound by such assessment and cannot go into the correctness or otherwise of the same.

10. Though the Commissioner cannot assess the loss of earning capacity without the assistance made by the qualified medical practitioner regarding loss of earning capacity or disregard to the assistance made by the qualified medical practitioner, the commissioner is not bound to ipso facto accept the certificate of the qualified medical practitioner prescribing the percentage of loss of earning capacity.

11. The Commissioner is competent authority to settle any dispute as to that the person injured is workmen or not, nature and extent of disablement liability of any person to pay compensation and the amount and duration of compensation under section 20(3) of the Act.

12. For the said purpose, the commissioner may avail the assistance of one or more persons possessing special knowledge of any matter relevant to the matter under inquiry.

13. The commissioner shall have all the powers of a civil court under the Code of Civil Procedure 1908 for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and compelling the production of documents and material objects.

14. When the assessment of medical practitioner is disputed, the commissioner has to find out whether such assessment is just and proper and can be accepted or not.

15. The commissioner can in appropriate cases even suo motu call for second opinion from the qualified medical practitioner or refer the workman to the expert for such opinion 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 the work in which the workman was engaged.

16. Once the medical certificate can be taken as evidence without admitting the same by the doctor, it will be open to the parties in challenging the medical certificate for obtaining step to examine the doctor. It is open to the employer or insurance company to bring evidence of rebuttal.

17. The determination of loss of earning capacity has to be with reference to 'all the work' which workman was capable of performing at the time of accident resulting in such disablement and not with reference to work which workman was performing at the time accident.

18. The commissioner can determine percentage of loss of earning capacity beyond the percentage of disability certified by the doctor, by considering the nature of job, physical diminution of power of workman having regard to the medical evidence on record.

19. Any disagreement with the percentage of loss of earning capacity fixed by the doctor has to be supported by reasoning. 20. When there is no qualified medical practitioner available for assessing loss of earning capacity, the matter has to be remitted to the Commissioner for workmen compensation for reassessing the same by giving due opportunity to the parties.

21. Oral testimony before the court has got highest worth and credibility than a simple certificate and the evidence of qualified medical practitioner regarding permanent disablement of the workman to undertake the work he was doing even in the absence of certification can be accepted. (2007 ACJ 1105)(Bombay)

(National Insurance co. Ltd. v. Rama and others)

22.As per definition under section 2(i), a person to be a qualified medical practitioner should be a person registered as such under the provisions of the law relating to medical practitioner, or declared by the State Government to be so qualified therein for the purposes of the Act.

23.Whether the particular medical practitioner is a qualified medical practitioner or not, is governed by the fact of registration in the State concerned. When the same is disputed, the facts need to be proved and can be disproved.

24.By taking judicial notice of the fact of his qualification and appointment by the State Government, the presumption to be raised is that he is a qualified medical practitioner and the presumption is rebuttal one on the basis of the pleadings and proof.

25.The commissioner alone is charged with the duty of adjudicating the compensation payable to the workman.

26.The payment of interest becomes due only after adjudication under section 4; and

27.Staring point for payment of interest is on completion of one month from the date on which it fell due. Only under such legal background, the claim made by the claimant for enhancement of compensation in the cross objection is to be considered.

32. In this case, the injured was found to be employed as cleaner. The multiple fracture sustained and multiple operation undergone by him are spoken by PW1 claimant and PW2 and PW4 doctors. He has assessed the physical disablement at 59% in his Ex.A6 disability certificate and he explained in detail about the physical disablement sustained by him. It may be true that PW2 has not deposed any thing about his functional disability and loss of earning capacity. However, the tribunal considering the oral evidence of PW2 about the nature and extent of physical disability and impact of the same upon the functional disability of the injured in relation to his day today activities accepted his loss of earning capacity

at the same percentage of 59% and proceeded to determine the compensation on that basis. The cross objection is filed by questioning the omission on the part of the learned Commissioner in not considering the percentage of disability for restriction of movement in right knee. It is not in dispute that PW2 has fixed no percentage of disability for the same in his Ex.P6. This court finds some considerable force in the contention so raised on the side of the cross objector to the extent that the percentage of loss of earning capacity need not be the same percentage as that of permanent disability. Having regard to the omission on the part of PW2 to fix any percentage for restriction of movement of right knee, which according to PW2 can be reasonably fixed at 15% and the percentage of loss of earning capacity, considering the nature of his work, is enhanced to 74% and correspondingly, the quantum of compensation is determined at $60/100 \times 3646 \times 201/666 \times 74/100 = \text{Rs.}3,26,452/-$ and the same is payable to the claimant with interest at 12% p.a. after 30 days from the date of the accident till date of deposit.

33. In the result, the appeal is dismissed and the cross objection is allowed by enhancing the compensation to Rs.3,26,452/- payable with 12% per annum after 30 days from the date of accident till date of deposit into court by the second respondent/insurer. The time for payment of balance amount is one month from the date of receipt of copy of this order. On such deposit, the claimant is permitted to withdraw the entire amount with accrued interests and costs.

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