(1999) 06 CAL CK 0023

Calcutta High Court

Case No: F.M.A. No. 1404 of 1997

National Insurance Co. Ltd.	APPELLANT
Vs	
Susanta Das and Another	RESPONDENT

Date of Decision: June 28, 1999

Acts Referred:

- Workmens Compensation Act, 1923 - Section 30

Citation: (2001) ACJ 1047 : (2000) 84 FLR 140 : (2000) 1 LLJ 463

Hon'ble Judges: Bhaskar Bhattacharya, J; Amit Talukdar, J

Bench: Division Bench

Advocate: K.K. Das, for the Appellant;K. Banik, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.
This appeal u/s 30 of the Workmen''s Compensation Act is at the instance of the Insurance Company and is directed against an Award dated March 5, 1997 passed by the 2nd Commissioner for Workmen''s Compensation, West Bengal in Claim Case No. 524 of 1995 thereby awarding a sum of Rs. 1,05,895/- on the ground of 100% loss of earning capacity.

2. The respondent No. 1 lodged the aforesaid claim case on the grounds that he was working as a "Khalasi" of the Vehicle No. WGE 2377 owned by the respondent No. 2 and insured with the appellant, that on June 3, 1994 on its way to Calcutta from Santipur, the vehicle met with an accident, as a result, the respondent No. 1 received injuries in both hands, shoulder, waist and back, that he was initially treated at Ranaghat Sadar Hospital and subsequently at Kalyani Hospital and a surgical operation was done in the said hospital in the left hand and that he had suffered 100% loss of earning capacity. In the said application he described his monthly wages as Rs. 1500/- a month and claimed a lumpsum payment of Rs. 1,05,895/- for loss of 100% earning capacity and further claimed penalty and interest from the

date of accident.

3. The aforesaid claim case was not contested by the respondent No. 2, the owner of the vehicle. The appellant however contested the claim by filing written statement.

4. At the time of hearing of the aforesaid case, the claimant himself deposed as P.W.-1, a "co-khalasi" of the vehicle and eye witness of the accident gave evidence as P.W.-2 and the Doctor certifying 100% loss of earning capacity figured as P.W.-3. The appellant adduced no evidence to contradict the evidence given on behalf of the respondent No. 1.

5. The learned Commissioner, on the basis of the materials on record, accepted the case of the respondent No. 1 that he was aged 28 years and was in the employment of respondent No. 2 as a ''Khalasi'' of the vehicle insured with the appellant and that he suffered a loss of 100% earning capacity due to such accident and thus passed the award impugned in this appeal.

6. Mr. Das, the learned advocate appearing on behalf of the appellant at the outset challenged the findings of the Commissioner on all the points viz. age of the applicant, relationship of master and servant between respondent No. 2 and the applicant, rate of salary, nature of injury and even the factum of accident.

7. After going through the materials on record we find that all the findings recorded by the learned Commissioner are based on appreciation of uncontroverted evidence adduced on behalf of the respondent No. 1 and any prudent man from the materials on record will come to such findings. Therefore, there is no scope of interference with such findings of fact based on evidence in this appeal u/s 30 of the Workmen''s Compensation Act.

8. Mr. Das has however raised a pure question of law in support of this appeal.

9. According to Mr. Das, even if the case of the respondent No. 1 as regard the injuries is accepted, it is a case of loss of only left hand; but such injury does not come within any of the items Nos. 1 to 6 as mentioned in Schedule-I of the aforesaid Act. Mr. Das contends that only in the cases of Serial Nos. 1 to 6 of Schedule-I, the Commissioner can declare 100% loss of earning capacity. Mr. Das submits that in case of loss of both hands or loss of a hand and a foot as specified in Serial Nos. 1 and 2 respectively, the Commissioner declares 100% loss of earning capacity. Mr. Das opines that this is a case where the Commissioner ought to have held that the respondent No. 1 lost 50% of earning capacity, having lost only the left hand. In support of such contention Mr. Das has relied upon the following decisions:

a) Dhrubendra Ray Vs. Biswanath Agarwal and Another,

b) New India Assurance Co. Ltd. Vs. Chittaranjan Sandha and Another,

c) New India Assurance Co. Ltd. Vs. Bhagaban Bhuyan and Another,

d) New India Assurance Co. Ltd. v. Sammayya and Ors. 1997 ACJ 185 (AP)

10. In the case of Dhrubendra Ray (supra), the Court was considering a case of permanent partial disablement resulting from injury. The certificate issued by the Doctor did not breath a word about the nature of job which was being undertaken by the claimant. The Commissioner, in that case, did not consider the stand of the employer that the claimant was fit enough to discharge his normal duties and was working as a driver under another employer. The certificate merely contained the recital that extent of the permanent disability was 50%. In the fact of such a case, PASAYAT, J., observed that such certificate could not be accepted as it did not take note of the nature of the duty to be performed by the claimant nor did it mention the percentage of loss of earning capacity. In our opinion, the said decision has no factual application to the instant case where the Doctor being examined as P.W.-3 has clearly asserted that sensation over the left index, middle, right and little fingers are absent with ventral contracture of all these fingers. He further opined that the claimant was unfit for the job of ''Khalasi'' of a vehicle and as such sustained permanent total disablement of 100%

11. New India Assurance Co. Ltd. v. Chittaranjan Sandha and Anr. (supra) is a case u/s 4(1)(c)(ii) of the Act where the Doctor assessed the percentage of permanent disability as 40%. The said evidence was not accepted as the Doctor''s assessment was not in conformity with the provision contained in Section 4(1)(c)(ii) and Explanation II of the said section. Such is not the case in our hand and thus the said decision does not help the appellant in any way.

12. We fail to understand how the decision in the case of New India Assurance Co. Ltd. v. Bhagaban Bhuyan and Anr. (supra) can be of any assistance to the appellant. In the said case, although the Tribunal observed that there was no material in support of the injuries, but nevertheless awarded Rs. 45,000/- plus Rs. 1,000/- for damage to the cycle of the claimant Under the aforesaid circumstances, PASAYAT, J. instead of remanding the matter, in order to avoid delay, himself assessed the amount of compensation on the basis of materials on record.

13. In New India Assurance Co. Ltd. v. Sammayya and Ors. (supra) it was held by Andhra Pradesh High Court that if the Commissioner had evidence before him only to show loss of permanent partial or total disablement, but not the evidence to show actual loss of earning capacity, he could not straightaway conclude that loss of earning capacity of the workman was equal to the percentage of partial or total disablement. As indicated earlier, in this case the Doctor as P.W.-3 has given evidence that in view of the nature of job of a ''khalasi'' of a vehicle, the claimant suffered 100% loss of earning capacity. Therefore, the said decision is also of no avail to the appellant.

14. Therefore, in our considered opinion, the learned Commissioner rightly relied upon the evidence of the Doctor and concluded that the claimant suffered 100% loss

of earning capacity. We do not find any substance in the contention of Mr. Das that the claimant having lost only one hand, the loss of earning capacity should be 50% because the Schedule-I prescribes 100% loss of earning capacity in case of loss of both hands.

15. Mr. Das lastly by relying upon the decision of the Apex Court in the case of Lilaben Udesing Gohel, Shyamala Shashidharan Nayyar and Others, Pramilaben Narendra Bhai Patel and Others, Ramabhai Shankarbhai Chavda, Lilaben and Others, Kantaben Anil Kumar Patel and Others, Motor Vahan Durghatna Sanghthan, Nadiad and Others and Shardaben Chandubhai Patel and Others Vs. Oriental Insurance Company Ltd. and Others, Hemraj Loduram Rajpur and Another, Nandubhai Ambalal Thakkar and Others, Ganibhai Ambabhai Vora and Another, Kaji Gulam Nabi Sheikh and Others, Gujarat State Road Transport Corpn. and Others, State of Gujarat and Others and Bachusha Dadusha and Others, contended that instead of permitting the respondent No. 1 to withdraw the amount of compensation, we should pass an order for keeping the said amount in a long term fixed deposit with a Nationalised Bank enabling the claimant only to withdraw interest therefrom.

16. In our view, the direction given by the Apex Court in the aforesaid case arising out of a proceeding under Motor Vehicles Act cannot be followed in the case in hand in view of Section 8(6) of the Workmen''s Compensation Act.'' The aforesaid provision of the Act gives a mandate to the Commissioner to pay the amount of compensation to a claimant who is not a woman or a person under legal disability by employing the word "shall" in such a case; on the other hand by using the word "may" in a case where the claimant is a woman or a person under legal disability, the Act gives discretion to the Commissioner to pass appropriate order as regards manner of payment of compensation as provided in Sub-sections (7) and (8) of the aforesaid section. Therefore, we are unable to pass any such direction as regards the manner of payment of compensation as suggested by Mr. Das.

17. Mr. Banik, the learned advocate appearing on behalf of the respondent No. 1/claimant prayed for modification of the award impugned herein by passing a direction for payment of interest on the amount awarded from the date of accident. We are afraid, in the absence of any appeal or cross-objection at the instance of the respondent No. 1 against the award, this Court cannot modify the award in his favour to the detriment of the appellant in the appeal preferred by the Insurance Company. Mr. Banik although has relied upon several decisions in support of his contention that an appellate Court can pass a further direction for payment of interest but he could not place any authority before us showing that in an appeal by Insurance Company or employer, an appellate Court has incorporated a new direction for payment of interest from the date of accident notwithstanding the fact that the claimant has not preferred any separate appeal or cross-objection against the Award. Thus, the prayer of Mr. Banik cannot be acceded to.

18. Therefore, there is no merit in the instant appeal and as such the same is dismissed with costs which we assess at 100 GMS.

A. Talukar, J.

19. I agree.