(1970) 02 CAL CK 0026

Calcutta High Court

Case No: A.O.O. No. 517 of 1969

Commissioners for the Port of Calcutta		APPELLANT
	Vs	
Ajit Kumar Gosh		RESPONDENT

Date of Decision: Feb. 12, 1970

Acts Referred:

- Workmens Compensation Act, 1923 - Section 2(1), 4(1), 4C

Citation: (1970) ACJ 320 : 76 CWN 639

Hon'ble Judges: Sabyasachi Mukharji, J; Arun Kumar Mukherjea, J

Bench: Division Bench

Advocate: Nalini Kanta Mukherji, for the Appellant;Satya Kanta Saha, for the Respondent

Final Decision: Dismissed

Judgement

Sabyasachi Mukharji, J.

This is an appeal from the order of the Additional Commissioner, Workmen''s Compensation, West Bengal. The facts are shortly as follows:-On 30th September, 1964 Ajit Kumar Ghose filed an application for compensation. His case was that he was a workman employed by the Commissioner for the Port of Calcutta and he received personal injury by accident arising out of and in the course of his employment on the 19th of June, 1964. He has stated that he was working as a Storeman in the Item No. 258, Section Senior Ship Wright Department, C.M.E., at "Island Brooks Top" at 14, Garden Reach Road, Calcutta at the Godown, when he fell down from the ladder, as a result whereof he sustained injuries in the left wrist. He has stated he was in monthly wage group of Rs. 200/- to Rs. 300/-and he claimed a compensation of a sum of Rs. 4,480/- calculating the same @ 40% loss of earning capacity. In the written statement the Commissioners for the Port of Calcutta admitted the employment but denied the accident. They also denied the rate of wages as claimed by the Applicant. They further denied the nature of the injury and accordingly prayed for the dismissal of the claim. The Commissioners for the Port of

Calcutta after filing the original written statement filed an additional written statement but as it was filed late it was ordered on the 2nd February, 1967 that the additional written statement would be accepted on payment of costs as condition precedent by them. As costs as directed were not paid, the additional written statement was not accepted. The following issues were settled by the learned Additional Commissioner of Workmen''s Compensation, West Bengal-- (1) Was the Applicant a ''workman'' within the meaning of Workmen''s Compensation Act" (2) Did the accident arise out of and in the course of the Applicant''s employment under the opposite party ? (3) Has the Applicant sustained any permanent partial disablement ? If so, to what extent ? (4) What is the monthly rate of wage of the Applicant? (5) Has the Applicant suffered any diminution in his earning capacity and, if so, to what extent ? (6) What compensation, if any, is the Applicant entitled to ? On the first two issues, in his judgment dated 18th of November, 1968, the learned Additional, Commissioner, Workmen''s Compensation, West Bengal held that the claimant was. a ''workman'' within the meaning of Workmen''s Compensation Act and he met with an accident on 19th June, 1964 as alleged during the course of his employment under the opposite party. On the third issue, the learned Additional Commissioner held that the claimant had suffered permanent partial disablement to the extent of 15%. On the Fourth issue the learned Additional Commissioner was of the opinion that claimant was in a monthly wage group of Rs. 150/-to 200/- at the time of the accident. On the Fifth and Sixth issues the learned Additional Commissioner came to the conclusion that the claimant had suffered diminution in his earning capacity to the extent of 15% and calculating the same on the basis of his finding the learned Additional Commissioner came to the conclusion that the claimant was entitled to compensation for the sum of Rs. 1,074.97 paise. He ordered accordingly. Being aggrieved by the said judgment the Commissioners for the Port of Calcutta, the Appellants herein, have preferred this appeal under the Workmen''s Compensation Act.

2. Mr. Mukherji, learned Advocate for the Appellant, contended before us that there was no evidence upon which the learned Additional Commissioner could come to the finding that the Respondent was a workman under the Workmen''s Compensation Act. Mr. Mukherji next urged that there was no evidence at all of the loss of earning capacity and as such no basis upon which the learned Additional Commissioner has awarded the compensation.

3. So far as the first contention is concerned, Mr. Mukherji contended that the evidence showed that the Respondent was a clerk and not a storeman. Unfortunately for Mr. Mukherji''s client this fact was not stated in a written statement. The second written statement was not admitted and in the facts and circumstances of this case, we must hold that it was properly not admitted. Indeed before us Mr. Mukherji has not made any point showing that non-admission of the additional written statement in view of the conduct of his client was not justified. It must therefore be held that the learned Additional Commissioner was justified on

the basis of the first written statement in holding that the Applicant was a storeman. There was evidence before him that the Respondent used to carry goods by his own hands though not on his head. There was further evidence, that it was the duty of the claimant to receive goods and deliver goods by hand. It is not possible for us to weigh, the sufficiency of evidence. Therefore we are unable to accept Mr. Mukherji''s first contention.

4. So far as the second contention of Mr. Mukherji is concerned, it requires a little detailed examination Mr. Mukherji''s grievance was that there was no evidence showing that the earning capacity of the workman-had decreased. u/s 2(1)(g) of the Workmen''s Compensation Act, 1923 "partial disablement" means, where disablement is of a temporary nature that which reduces, the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement and where the disablement is of a permanent nature such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time. It is also provided by the said clause that every injury specified in Schedule I shall be deemed to be permanent partial disablement. The present case is not of course of any type of injury specified in schedule I of the said Act. For the determination of the amount of compensation where there is permanent partial disablement from injury it is provided by Section 4C of the Workmen''s Compensation Act, 1923 as follows:

4(c) Where permanent partial disablement results from the injury--

(i) in the case of an injury specified in Schedule I, 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, permanently caused by the injury.

5. This was a case where there was partial disablement. Therefore it was necessary that (a) there should be an accident, (b) as a result of the accident the workman should suffer injury, (c) which should result in permanent disablement and (d) and as a result whereof his earning capacity must have decreased permanently. In the proportion in which his earning capacity has been decreased permanently he is entitled to compensation. This point has been the subject matter of judicial interpretation in several decisions including the several decisions of this Court. In the case of East Indian Railway v. Maurice Cecil Ryan AIR 1937 Cal 528, Derbyshire, C.J. held that in awarding compensation u/s 4(c)(ii), Workmen''s Compensation Act, what has to be estimated is the loss of the workman''s earning capacity caused by the injury and not the loss of his physical capacity. A surgeon might well estimate the loss of his physical capacity for work but the loss of earning capacity must be

estimated by some other person and the best estimate can be given by the employer himself who has the opportunity of seeing the workman work before and after the accident. The case emphasises the distinction between the loss of earning capacity and the loss of physical capacity. In the case of Kali Das Ghosal Vs. S.K. Mondal, , Chakravarti, C.J. held that the Workmen''s Compensation Act is not concerned with physical injury as such, nor with the mere effect of such injury on the physical system of the workman, but it is concerned only with the effect of such injury or of the diminution of physical powers caused thereby on the earning capacity of the affected workman. To what extent the earning capacity has been affected can never be for a medical witness to say. Medical witness is opinion evidence and it is only with regard to the physical aspect of the injuries that the opinion of the medical witness is relevant and admissible as the opinion of an expert. But loss of earning capacity is not a matter for medical opinion and is not a matter on which medical witness can possibly speak. After the medical evidence as to the nature and measure of physical infirmity has been given, the substance of that evidence is to be taken over and applied to the assessment of the loss of earning capacity as one of the factors and perhaps the principal factor. But loss of earning capacity or the extent of it is a question of fact. It has got to be determined by taking into account the diminution or destruction of physical capacity, as disclosed by the medical evidence and then it is to be seen to what extent such diminution or destruction could reasonably be taken to have disabled the affected workman from performing the duties which a workman of his class ordinarily performed and from earning the normal remuneration paid for such duties. 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. It is therefore altogether wrong in taking the evidence of the medical witness not only as relevant but as decisive on the question of earning capacity. The point was again considered in the case of Commissioners for Port of Calcutta Vs. Prayag Ram, . There Sinha, C J., held that in a claim u/s 4(l)(c)(ii) of the Workmen''s Compensation Act, 1923 what has to be estimated is the "loss of earning capacity" which is quite different from loss of physical capacity. The "loss of earning capacity" is an issue of fact which must be proved by evidence of physical injury resulting in loss of earning capacity. His Lordship further held that the issue cannot be decided upon medical evidence only. 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. In the case of P.E. Davis and Co. Vs. Kesto Routh, , A.K. Mukherjea, J., reiterated the aforesaid view on this aspect of the matter. The same view was again reiterated in the case of Calcutta Electric Supply Corporation Ltd. Vs. Habul Chandra Das, . In the case of Calcutta Licensed Measurers Bengal Chamber of Commerce Vs. Md. Hossain, , A. N, Ray, J., held that the following propositions can be deduced from the decided cases (1) earning is not the same as earning capacity. (2) the rise in earning may be because of various

factors and rise in wages is not decisive of no loss of earning capacity, (3) loss of physical capacity is not coextensive with the loss of earning capacity and (4) loss of physical capacity or physical incapacity may be relevant in assessing to what extent there is loss of earning capacity for every employment which the workman was capable of undertaking at that time or the employment in which he was engaged at the time of the accident as the case falls for consideration. It was further held that the loss of earning capacity or the extent of it is a question of fact. It has to be determined by taking into account the diminution or destruction which could reasonably be taken to have disabled the affected workman from performing the duties which a workman of his class ordinarily performed. Therefore, medical evidence as to physical capacity or diminution of physical capacity is an important factor in the assessment of loss of earning capacity. In the case before their Lordships there was medical evidence of disablement. There was evidence of the workman himself that he could not do heavy work even at the time when giving evidence long after the accident. The workman had further stated that he did such heavy work before the accident. There was therefore evidence that he was doing heavy work before accident and earning thereby and he was incapable of doing heavy work later on. There was no cross examination on this point. Taking this fact in conjunction with other factors, the learned Additional Commissioner of Workmen''s Compensation in that case had awarded certain compensation to the workman on the basis of his loss of earning capacity. The Court did not interfere with that finding of the learned Additional Commissioner.

6. Therefore discussion of all these cases reveals that though medical evidence showing loss of physical capacity is a relevant factor it is certainly not the decisive factor as to loss of earning capacity. It is loss of earning capacity that has to be determined. If, however, there is evidence on this point of loss of earning capacity, sufficiency of that evidence is not a matter for this Court. But in order to find out loss of earning capacity there must be some evidence covering all the points required to be found, that is to say, there must be evidence that the workman suffered partial disablement as a result whereof his earning capacity has permanently decreased or diminished.

7. Bearing the above principles in mind, we have to examine the facts and evidence in this case. There was medical evidence adduced both by the workman as well as the Appellant The Doctor on behalf of the workman stated that the workman had suffered permanent partial disablement to the extent of 30%. and thereby his movements were restricted and painful, the grip had become weak and incomplete. The Doctor on behalf of the Appellant stated that the workman had suffered partial disablements to the extent of 15%. He has stated that the grip is weak though full. Therefore, there was evidence that there was injury as a result of the accident which caused certain permanent partial disablement The next question that had to be considered by the learned Additional Commissioner was whether as a result of this there has been any permanent loss of earning capacity. The learned Additional

Commissioner saw the workman personally. Visual examination by a Judge in a case like this may become relevant in the background of other factors. The learned Additional Commissioner had before him the evidence of the type of work that this workman used to do. The learned Additional Commissioner has recorded certain evidence upon which he has come to the finding that the workman was in the wage group of Rs. 150/- to Rs. 200/- at the time of the accident. The workman has also given evidence that he could not do the same standard of work as before. The learned Additional Commissioner has found that there was evidence that the workman used to get Rs. 200/- p.m. on an average at the time of accident and he was in the earning group of Rs. 150/- to Rs. 200/-. There was also evidence that his monthly wages have been reduced to Rs. 150/- Taking the cumulative effect of all the factors there was evidence of the accident injury resulting in partial disablement, and having regard to the nature of the injury which the learned Additional Commissioner himself saw, in the background of the evidence about the nature of the work that the worker used to do and having regard to the fact that there was evidence that his wages had decreased after the accident, it cannot is said that there was no evidence to justify the finding of the learned Additional Commissioner that the worker had suffered diminution of earning capacity to the extent of 15%. It is true that loss of wages or decrease in wages or loss of earning is not the same thing as the loss of earning capacity. But it might become a relevant factor in deciding the question of loss of earning capacity in certain cases. In that view of the matter the second contention of Mr. Mukharji must be rejected.

8. In the result this appeal fails and is hereby dismissed. There will be no order as to costs. All interim orders are vacated.

Aran K. Mukherjea, J.

9. I agree.