IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 102 OF 2021

Reliance General Insurance Co. Ltd.
4th floor, Chintamani Avenue,
Off. Western Express Highway,
Next Virwani Industrial Estate,
Goregaon {East}, Mumbai-400 063 ... Appellant
(Orig. Respondent no.2-being the Insurer)

Versus

1. **Mr.Keshar Gopal Singh Thakur**
   Om Ganesh Nagar, Vasi Naka,
   Room No. 75, Chembur,
   Mumbai-400 075. ...Respondent No.1
   (Orig. Applicant)
2. **Mr.Gurpreet Singh Saini,**
   My Divine Co-op. Hsg. Society,
   Aziz Baug, Mahul Road,
   Chembur, Mumbai 400 074. ..Respondent No.2

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Ms. Kalpana R. Trivedi, Advocate for appellant.
Mr.Amol Gatane i/b Ms.Swati U. Mehta for respondent No.1.

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CORAM : N.J. JAMADAR, J.
Reserved for Order on : 16th NOVEMBER 2021.
Pronounced on : 10th JANUARY 2022.
(THOUGH VIDEO CONFERENCE)

JUDGMENT :

1. This appeal is directed against a judgment and award dated 7th February 2020 passed by learned Commissioner for Employees' Compensation and Judge, Tenth Labour Court, Mumbai, in Application (ECA) No. 336/C-80 of 2014, whereby, the application preferred by respondent No.1-original applicant

came to be allowed and appellant and respondent No.2-employer were directed to jointly and severally pay an amount of Rs.8,70,576/- alongwith simple interest at the rate of 12% per annum from the date of accident till realization for the permanent disablement suffered during the course of employment. In addition, respondent No.2-employer was saddled with a penalty of 40% of the compensation. (The parties are hereinafter referred to in the capacity they were arrayed before the learned Commissioner for Employees' Compensation).

2. The appeal arises in the backdrop of the following facts :

(a) Respondent No.1-applicant was in the employment with respondent No.2-opponent No.1 as a Driver on tanker bearing No. GH-16/ X-7166, which was insured with the appellant/original opponent No.2.

(b) On 18th March 2014, while the applicant was on the wheel of the above-numbered vehicle, at Mohol, District Solapur, a motor cyclist threw a stone towards applicant. The latter suffered grievous injuries on his head and face. Initially, the applicant was taken for treatment at Chhatrapati Shivaji Maharaj Hospital at Solapur. Later on, the

applicant was referred to Lokmanya Tilak Medical College Hospital, Sion, Mumbai ('Sion Hospital'). On account of the injuries sustained in the accident, the applicant was required to undergo evisceration of the right eye. The applicant, thus, suffered 100% permanent disability, which entailed the consequence of incapacitating the applicant from working as a driver. Thus, the applicant preferred an application for compensation before the learned Commissioner.

(c) The opponent No.1/employer did not appear despite service of notice. Hence, the application proceeded ex-parte against opponent No.1.

(d) The opponent No.2-insurer resisted the application by filing written statement. The employer-employee relationship between the opponent No.1 and the applicant was put in contest. The mode and manner of the alleged accident and the injuries and the consequent disability, stated to have been sustained by the applicant, were denied.

(e) The learned Commissioner recorded evidence of the applicant Keshar Gopal Singh Thakur (AW-1) and Dr.Naresh M. Khanna (AW-2), Orthopedic Surgeon, who had examined the applicant, and issued the disability certificate (Exh.U-19). The learned Commissioner also perused the documents tendered on behalf of the applicant, including the medical record and the discharge cards issued by Chhatrapati Shivaji Maharaj Hospital, Solapur and Sion Hospital, Mumbai.

(f) After appraisal of the oral and documentary evidence and the material on record, the learned Commissioner was persuaded to record a finding that though the permanent partial disability was certified at 54%, yet the applicant, having lost the right eye, was totally incapacitated from performing the work of a driver. Thus, the learned Commissioner opined that the applicant suffered 100% loss of earning. Resultantly, applying the prescribed formula, the learned Commissioner awarded the compensation as indicated above.

3. Being aggrieved by and dissatisfied with the impugned judgment and award, the opponent No.2/insurer is in appeal.

4. Having regard to the nature of controversy sought to be raised on behalf of the appellant-insurer, by an order dated 18th June 2021, the parties were notified that an endeavour would be made to dispose of the appeal finally at the stage of admission.

5. I have heard Ms.Kalpana Trivedi, the learned counsel for the appellant and Mr.Gatane, the learned counsel for the respondent No.1-applicant, at length. With the assistance of the learned counsels for the parties, I have perused the pleadings, depositions and documents, which were on the file of the learned Commissioner, and a compilation of which is tendered by the learned counsel for the appellant.

6. At the outset, Mr.Gatane, the learned counsel for respondent No.1-original applicant would urge that in view of the interdict contained in section 30 of the Employees Compensation Act, 1923 ('the Act, 1923'), this appeal cannot be entertained as it does not involve any substantial question of law. An endeavour was made to demonstrate that the grounds sought to be raised by the appellant, in support of the instant appeal, are essentially rooted in facts. The questions as to

whether employer-employee relationship exists, whether the employee suffered injuries in an accident and the nature and extent of disability suffered therein are all questions of facts.

7. Mr. Gatane, the learned counsel for respondent No.1 would further urge that the appellant having not contested the application before the learned Commissioner, cannot be permitted to now agitate the questions of facts. It was urged with a degree of vehemence that this Court in exercise of limited appellate jurisdiction cannot entertain the aforesaid grounds of challenge since no substantial question of law arises for consideration. In the case at hand, according to Mr. Gatane, the question as to whether the applicant suffered 100% functional disability is essentially a question of fact. Therefore, the appeal deserves to be dismissed at the threshold.

8. On the aspect of the limited nature of the appellate jurisdiction, circumscribed by the provisions contained in section 30 of the Act, 1923, Mr.Gatane placed reliance on the judgment of the Supreme Court in the case of ***North East Karnataka Road Transport Corporation Vs. Sujatha*** [1]**,** wherein limited nature of appeal under section 30 of the Act 1923 was expounded as under :-

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1 (2019) 11 SCC 514

> *9. At the outset, we may take note of the fact, being a settled principle, that the question as to whether the employee met with an accident, whether the accident occurred during the course of employment, whether it arose out of an employment, how and in what manner the accident occurred, who was negligent in causing the accident, whether there existed any relationship of employee and employer, what was the age and monthly salary of the employee, how many are the dependents of the deceased employee, the extent of disability caused to the employee due to injuries suffered in an accident, whether there was any insurance coverage obtained by the employer to cover the incident etc. are some of the material issues which arise for the just decision of the Commissioner in a claim petition when an employee suffers any bodily injury or dies during the course of his employment and he/his LRs sue/s his employer to claim compensation under the Act.*
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> *10. The afore-mentioned questions are essentially the questions of fact and, therefore, they are required to be proved with the aid of evidence. Once they are proved either way, the findings recorded thereon are regarded as the findings of fact.*
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> *11. The appeal provided under Section 30 of the Act to the High Court against the order of the Commissioner lie only against the specific orders set out in clause (a) to (e) of Section 30 of the Act with a further rider contained in first proviso to the Section that the appeal must involve substantial question of law.*
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> *12. In other words, the appeal provided under Section 30 of the Act to the High Court against the order of the Commissioner is not like a Regular First Appeal akin to Section 96 of the Code of Civil Procedure, 1908 which can be heard both on facts and law. The appellate jurisdiction of the High Court to decide the appeal is confined only to examine the substantial questions of law arising in the case."*

9. Indeed, in view of the clear and explicit provisions contained in section 30 of the Act, 1923, the jurisdiction which the High Court exercises in an appeal thereunder hinges upon

existence of a substantial question of law for determination. All issues on facts and law are not open for challenge in an appeal under section 30 of the Act, 1923.

10. Ms.Trivedi, the learned counsel for the appellant would, however, urge that the fact that the learned Commissioner recorded a finding that the applicant suffered total disablement within the meaning of section 2(1)(l) of the Act, 1923 without there being evidence of the doctor in support of the claim that the applicant lost right eye, on account of the injury sustained in the accident, itself constitutes a substantial question of law.

11. Indisputably, the disability certificate (Exh.U-19) was issued by Dr. Naresh Khanna (AW-2) an Orthopedic Surgeon. In this view of the matter, in my considered view, the instant appeal raises a substantial question of law as to whether the learned Commissioner, in the backdrop of the evidence on record, was justified in recording a finding that the applicant suffered total disablement within the meaning of section 2(1)(l) of the Act, 1923 and the consequent 100% loss of earning capacity.

12. Elaborating the aforesaid submission, Ms. Trivedi would urge that, on the one hand, Dr.Naresh Khanna (AW-2)

categorically asserted that he had not taken into account the damage to eye in assessing the disability, and, on the other hand, there is no explanation much less plausible one as to why there is no certificate from an eye surgeon to the effect that the applicant lost right eye on account of the injuries sustained in the accident. In the absence of positive evidence to indicate that the applicant lost right eye, the learned Commissioner fell in grave error in drawing an inference that the applicant suffered total disablement. This finding vitiated the entire judgment, submitted Ms. Trivedi.

13. In the circumstances of the case, according to Ms.Trivedi, a remand of the matter to the learned Commissioner for a fresh determination is warranted.

14. Mr.Gatane, the learned counsel for respondent No.1-original applicant joined the issue by canvassing a submission that the aforesaid submission on behalf of the appellant is based on an incorrect appreciation of the governing provisions. Inviting the attention of the Court to Entry 4, Part I of Schedule I appended to Act, 1923 and comparing and contrasting the same with Entry 25 of Part II of the said Schedule, Mr. Gatane would urge that the case at hand is one of permanent total disablement and not permanent partial disablement.

15. Mr. Gatane controverted the submissions on behalf of the appellant that there is no material on record to indicate that the applicant had lost the right eye, on account of the injuries sustained in the accident. Inviting the attention of the Court to the medical record maintained at Chhatrapati Shivaji Maharaj Hospital at Solapur and Sion Hospital, Mumbai, Mr.Gatane would urge that there is clear evidence to indicate that the right eye of the applicant was eviscerated. In the face of such material, mere non-examination of the doctor, who performed the eye surgery, cannot defeat the legitimate claim of the applicant, submitted Mr.Gatane.

16. Section 2(1)(g) of the Act, 1923 defines "partial disablement" as under :

> *"2(1)(g) "partial disablement" means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a [employee] 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: provided that every injury specified [in Part II of Schedule I] shall be deemed to result in permanent partial disablement."*

17. Whereas 'total disablement' is defined in clause (l) as under :

> *"2(1)(l) total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a *[employee] for all work which he was capable of performing at the time of the accident resulting in such disablement:*

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent. or more;

18. Entry 4 of the Schedule I, Part I referred to in section 2(1) (g) reads as under :

Serial No.	Description of Injury	Percentage of loss of earning capacity
4	Loss of sight to such extent as to render the claimant unable to perform any work for which eyesight is essential.	100%

19. Entry 25 of the Schedule I, Part II, referred to in clause (1) of section 2(1) of the Act, 1923 reads as under :

Serial No.	Description of Injury	Percentage of loss of earning capacity
25	Loss of one eye, without complications, the other being mormal	40%

20. In the facts of the case, the fate of the appeal hinges upon the determination of the question as to whether the injury suffered by the applicant constitutes permanent total disablement or permanent partial disablement within the meaning of the aforesaid provisions.

21. A brief resume of the evidence may be apposite. Keshar Gopal Singh Thakur (AW-1) affirmed that on account of the

injuries sustained in the accident, he was initially admitted at Chhatrapati Shivaji Maharaj Hospital at Solapur on 18th March 2014 and discharged on 23rd March 2014. Later on, he was shifted to Sion Hospital, Mumbai on 24th March 2014 and discharged on 30th March 2014. On account of the injuries sustained in the accident, he is incapacitated to work as a driver resulting in loss of 100% earning capacity.

22. Dr.Naresh Khanna (AW-2) professed to lend support to the claim of the applicant. Dr. Khanna claimed to have clinically and radio-logically examined the applicant and found the following disabilities :

1) Remnants of Head injury.
2) Headache, Dizziness, irritability,
3) Unable to do day to day activities.
4) Unable to drive vehicle due to loos of right eye.
5) Lapse of memory seen.

It was, however, clarified that he did not take into account eye damage in assessing the disablement.

23. In the cross-examination of the applicant an endeavour was made to draw home the point that he had not availed treatment from Dr.Khanna. He had approached Sion Hospital, Mumbai for disability certificate. However, it was not issued. The applicant, however, did not cave in to the suggestion that he had

not sustained the injury while driving the vehicle and he was assaulted by a motorcyclist on account of rivalry.

24. Dr.Khanna (AW-2), in turn, conceded that he had not treated the applicant. The latter had approached him for issue of disability certificate only.

25. On the basis of the aforesaid manner, in which the applicant and Dr.Khanna fared in the cross examination, Ms.Trivedi strenuously urged that the claim of the applicant that he had lost right eye on account of the injuries sustained in the accident cannot be said to have been established. Had there been no other evidence, this submission would have carried some conviction. However, there is evidence in the form of medical record, which establishes that the applicant was initially admitted in Chhatrapati Shivaji Maharaj Hospital, Solapur and later on shifted to Sion Hospital, Mumbai.

26. The record maintained at Sion Hospital, Mumbai, in the regular course of business, clearly indicates that the applicant was admitted therein on 24th March 2014 and discharged on 30th March 2014. Surgery was performed on 25th March 2014. This record lends unflinching corroboration to the claim of the applicant. It further records that the right eye evisceration with

vertical scleral suture and horizontal conjunctival suture, using it 6-0 viayl (IV) sedation, was done on 25th March 2014. In the face of this material, wherein the evisceration of right eye is recorded at multiple places and even on discharge cards evidencing subsequent admission in the hospital, I find it rather difficult to accede to the submission on behalf of the appellant that there is no material to substantiate the claim of the applicant that he lost right eye in the accident. By way of illustration, it would be suffice to record that the medical record (at Page 83) indicates that the applicant had 'right empty socket' and was admitted on 12th June 2014 and discharged on 13th June 2013. Evisceration of right eye is noted at multiple places in the medical record.

27. The crucial question which wrenches to the fore is whether the aforesaid injury resulting in evisceration of right eye led to permanent total disablement. Mr. Gatane, the learned counsel for respondent No.1-applicant would urge that the question cannot be decided bereft of the work which the applicant was performing before he met with the accident. With the loss of right eye, the applicant could not work as a driver any more, and, therefore, the learned Commissioner was justified in awarding the compensation on the premise that the applicant suffered 100% loss of earning capacity.

28. In contrast, Ms. Trivedi attempted to salvage the position by putting-forth a submission that there is no material to show that the applicant surrendered the license to drive the vehicle. Thus, it cannot be said that the applicant suffered 100% loss of earning capacity.

29. I find substance in the submission of Mr.Gatane. The aspect of loss of earning capacity which an injury entails is necessarily required to be determined keeping in view the distinction between the 'physical disability' and 'functional disability'. Whether the applicant is incapacitated to perform the work which he was performing before the accident is the question which the learned Commissioner is required to pose unto himself. If the answer is in the affirmative, despite the physical disability having been assessed at a lower threshold, an interference that the injury resulted in 100% loss of earning capacity can be legitimately sustained.

30. A useful reference in this context can be made to a judgment of a learned Single Judge of this Court in the case of ***Royal Sundaram Alliance Insurance Company Ltd. Vs. Manoj Laxman Patil & Anr.*** [2], wherein in a somewhat identical fact-situation, this Court, after considering the pronouncements

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2 [2017] (5) Mh.L.J. 404

which govern the determination of permanent total disablement permanent partial disablement, held that the case was one of total disablement envisaged under section 2(1)(1) of the Act, 1923.

31. In the case of ***Manoj Patil*** (Supra), the applicant therein had lost vision of the right eye and movement of the right leg. A submission was sought to be canvassed therein that those injuries by themselves did not render him incapacitated to carry on some other or lesser scale of activities and functions in order to continue to earn his livelihood and thus the applicant should not have been awarded compensation on the premise that the applicant had suffered total disablement. Repelling the submission, this Court held that the disablement was total. To arrive at the said conclusion, reliance was placed on the judgments of the Supreme Court in the cases of ***Pratap Narain Singh Deo Vs. Srinivas Sabata & Anr.*** [3] and ***S. Suresh Vs. Oriental Insurance Company Limited and Another*** [4].

32. In the case of ***Pratap Narain Singh Deo*** (Supra), the Supreme Court expounded the connotation of the term 'total disablement'; in the context of the facts of the said case, as under :-

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3 (1976) 1 SCC 289

4 (2010) 13 SCC 777

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

> *"(1) "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 41/2" 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."

[Emphasis supplied] "

33. In the case of ***S. Suresh*** (Supra), while reversing the decision of a Division Bench of the Karnataka High Court, the Supreme Court exposited the meaning of the expression 'total disablement' in section 2(1)(l) of the Act, 1923 as under :

"7 The correctness of the impugned judgment is questioned mainly on the ground that the claimant being a lorry driver, the loss of his right leg ipso facto meant a "total disablement" as understood in terms of Section 2(1)(l) of the Act and as such the compensation payable to the claimant had to be computed on that basis.

8 In support of the plea, reliance is placed on a four-

Judge Bench decision of this Court in Pratap Narain Singh Deo vs. Srinivas Sabata & Anr.1 In that case, a carpenter had suffered amputation of his left arm from the elbow. This Court held that this amounted to a total disability 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 was observed as under:

> *"5. The expression "total disablement" has been defined in Section 2(1)(l) of the Act as follows:*
>
> *(1) "total disablement" means such disablement whether of a temporary or permanent nature, as incapacitates 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."*

9. 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."

(emphasis supplied)

34. It would be contextually relevant to note that another learned Single Judge of this Court in the case of ***Shaikh Salim Ramzan Vs. Ashok Beniram Kothawade & Anr.*** [5] had an occasion to consider the extent of disablement in the case of the

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5 2011 (3) Mh.L.J. 275

driver who had suffered injuries in an accident. The medical officer had certified the disability at 30% only. Repelling the submission that the disability thus could not to be construed to be total, the learned Single Judge in the fact-situation of the case, observed as under :

> *"16 Though under the medical terms, the disability is only 30 % but while computing the compensation the loss of earning capacity is to be considered as because of the loss of vision of right eye, the appellant would not be in a position to continue with his avocation as a driver. It is not disputed that the appellant was driver by profession. In view of the fact that he had to surrender his licence, the appellant would not be in a position to drive the vehicle and continue as driver. Going through the definition of partial disablement and the total disablement as is envisaged in Section 2 (g) and (l) respectively, it is evident that the disablement to be considered is with regard to the reduction in the earning capacity of the workman in any employment, in which he was engaged at the time of accident resulting in disablement. In the present case though the medical disablement is about 30 %, still the said disablement is of permanent nature and has rendered appellant unfit for the work of driver.*
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> *17. It is not only the aspect of medical disablement i.e. required to be considered but taking into account the object and the spirit behind the provisions of the Workmen's Compensation Act and the definition of total disablement which means such a disablement whether of a temporary or permanent nature as incapacitates workman for all work, which he was capable of performing at the time of accident resulting in such disablement is required to be taken into consideration. The expression " incapacitates workman for all work which he was capable of performing at the time of accident resulting in such disablement " would mean the workman having been rendered incapable of performing that " work " which he had undertaken at the time of accident. The appellant being a qualified driver and was performing his duty as a driver, because of the loss of vision of right eye he has been incapacitated for all work as driver, he has been rendered unfit for the work of driver. The Commissioner, in such circumstances, committed a serious error of law in applying Section 4 (1) (c) instead of Section 4 (1) (b) of the Workmen's Compensation Act. Once we come to the conclusion that it is the case of permanent total disablement, Section 4 (1) (b) of the Act would be applicable. Consequently, Schedule I Part I and Item 4 would be*

applicable and not Schedule I Part II Item 25 as has been applied by the Commissioner. Item 4 of Part I of Schedule I lays down that if the loss of sight is to such an extent which renders claimant unable to perform any work for which eye sight is essential, then 100 % loss of earning capacity is to be considered. The claimant being driver, because of loss of vision of right eye, the claimant had to surrender licence rendering him unable to perform any work of driver thereby resulting in 100 % loss of earning capacity."

(emphasis supplied)

35. In view of the aforesaid exposition of law, it is too late in the day to urge that the work which the employee was performing before the accident has no relevance to the determination of the question as to whether the employee is permanently incapacitated to perform the said work.

36. The submission on behalf of the appellant that, in the case at hand, the applicant has not placed on record evidence to show that he was required to surrender the license, though appears attractive at the first blush, does not hold much ground. It is trite that with the loss of right eye, the applicant would not be able to drive the vehicle. Failure to place evidence to show that the applicant, in fact, surrendered the license thus does not distract materially the claim of the applicant that he is completely incapacitated from working as a driver.

37. For the foregoing reasons, I am persuaded to hold that the learned Commissioner was justified in awarding the compensation on the premise that the applicant suffered

permanent total disablement and 100% loss of earning capacity. Consequently, no interference is warranted in the impugned judgment and award.

38. Hence, the following order :

O R D E R

The appeal stands dismissed with costs.

Pending application, if any, also stands disposed of.

[N. J. JAMADAR, J.]