GAHC010160942011

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : MFA/29/2011

BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD.,
HAVING ITS REGISTERED and HEAD OFFICE AT GE PLAZA, AIRPORT ROAD, YERWADA, PUNE-411006 AND ITS AREA OFFICE AT G.S.ROAD, ULUBAI, GUWAHATI AND REPRESENTED BY THE BRANCH MANAGER, GUWAHATI BRANCH OFFICE.

VERSUS

PRASAD KALITA

Advocate for the Petitioner : MR. I ALAM

Advocate for the Respondent : MR. D K KATAKEY

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the appellant : Mr. R. Goswami, Advocate
For the sole respondent : None appears.
Date of hearing : 30.11.2023.
Date of judgment : 14.12.2023.

JUDGMENT AND ORDER

(CAV)

Heard Mr. R. Goswami, the learned counsel for the appellant.

None appears for call for the sole respondent.

2. It may be mentioned that as per order dated 20.09.2023, the learned amicus curiae appointed by this Court for the respondent was not present when the matter was called and therefore, another learned amicus curiae was appointed. However, as indicated herein before, none appears for the respondent on call. Thus, as this appeal was filed on 02.11.2010 and admitted for hearing by order dated 23.05.2011, the Court by recording the above in the order dated 30.11.2023, proceeded to hear the learned counsel for the appellant as only question of law is involved in this appeal. It may be mentioned that the name of respondent no.2, the owner of the vehicle was struck-off by order dated 22.06.2016.

3. This appeal under section 30 of the Employee's Compensation Act, 1923 is directed against the order and award dated 09.07.2010, passed by the learned Commissioner, Workmen's Compensation, Golaghat in W.C. Case No. 60/2008, thereby awarding a sum of Rs.4,99,152.00 (Rupees Four lakh ninety nine thousand one hundred fifty two only) in favour of the respondent by directing the appellant to satisfy the award.

4. This appeal has been admitted by order dated 23.05.2011 on the following substantial question of law:

> *Whether the learned Commissioner erred in assessing the amount of compensation by erroneously accepting the loss of earning capacity of the respondent- claimant to be 100% in disregard to the principles contained in section 4(1)(c) of the Workmen's Compensation Act (now Employees' Compensation Act, 1923)?*

5. In brief, the case of the respondent- claimant was that on 03.07.2008, while on duty as a driver, on NH-37 near Bakultol under Koliabor P.S. his truck bearing registration no. AS-01-AC-9371 had head-on collusion with another truck bearing registration no. NL-01-A-8649, which was being driven in

a rash and negligent manner and as a result of the accident, he had sustained (i) comminuted compound fracture of right leg (both bone), fracture injuries on both legs and multiple body injuries. He was taken to B.P. Civil Hospital, Nagaon and thereafter, he was shifted to GMCH, Guwahati and then he received treatment at a private hospital at Guwahati. The accident was registered under Koliabor P.S. G.D. Entry No.78 dated 03.07.2008. The respondent claimed that he was 26 years of age, getting monthly salary of Rs.4,000/- per month, excluding his daily allowance. It was also claimed that he was totally disabled and rendered unfit for doing job as a driver and accordingly, claimed compensation for a sum of Rs.5,16,672/- under the Workmen's Compensation Act, 1923.

6. In the proceedings before the Commissioner, Workmen's Compensation, the owner of the vehicle which was driven by the respondent no. 1 had appeared and he had admitted employment of the respondent as driver under him at the time of the accident and had projected that the truck was plying on the strength of all valid documents and was insured with the appellant. The appellant, who were opposite party no. 2 in the proceeding had contested the claim by denying the accident that the respondent was a workman or that he had suffered injuries in course of his employment and the age and income of the respondent was also disputed.

7. During trial, the respondent- claimant had examined three witnesses, viz., Prasad Kalita (respondent no.1) (CW-1); Dadu Bora @ Jan Bora (CW-2); and Dr. S. Nazim Hussain, SDM&HO, Golaghat (CW-3). The CW-1 had exhibited 17 documents, which included medical documents. The appellant did not examine any witness and did not prove any document.

8. Basing upon the evidence of CW-3, who was the Medical Officer

(orthopedic surgeon), and had deposed to the effect that the Medical Board had assessed physical disability as 50% and loss of earning was 100%, and relying on the decision of the Supreme Court of India in the case of *Pratap Narain Singh Deo v. Shrinivas Sabata & Anr., AIR 1976 SC 222*, and taking into consideration his age and earning calculated the compensation as follows, viz., 60% of Rs.4,000/- x 207.98 (relevant factor for a worker with age of 30 years) = Rs.4,99,152/-. The Commissioner, Workmen's Compensation, Golaghat had also awarded simple interest on the awarded sum at the rate of 9% per annum on the quantum of compensation from the date of filing of the claim petition i.e. 12.11.2008 till the date of realization.

9. The learned counsel for the appellant had submitted that there was no evidence to prove that the respondent had become totally incapacitated to perform all work he was capable of performing before the accident. It was submitted that the respondent had not suffered permanent total disablement and in this regard, reliance was placed on the provision of section 2(i) of the Employee's Compensation Act, 1932 ("EC Act" for short) and the following two cases were cited on the point, viz., *Pal Raj v. Divisional Manager, NE Karnataka Road Transport Corporation, (2010) 10 SCC 347*, and *National Insurance Co. Ltd. V. Bimal Nath, 2009 (1) GLT 370*. It was submitted that the assessment of loss of earning capacity was not in accordance with Explanation-II to section 4(1)(c) of the EC Act. It was also submitted that the Commissioner, Workmen's Compensation had failed to appreciate that as per proviso to section 2(g) of the EC Act, it is provided that every injury specified in Part-II of Schedule-I shall be deemed to result in permanent partial disablement. In the said regard, it was submitted that since the nature of injury suffered by the respondent is a non-specified injury in part-II of Schedule-I of the EC Act, it cannot be deemed that

the respondent had suffered permanent total disablement. Accordingly, it was submitted that the EC Act provides for calculating the compensation and such calculation is not left to the discretion of the Commissioner, Workmen's Compensation. It was also submitted that if total amputation of leg resulted in 100% loss of earning capacity, the loss of earning capacity could not be same if there was fracture in the leg, howsoever serious.

10. It was submitted that the case of *Pratap Narain Singh Deo (supra)* was decided on the distinguishable facts of the said case because in the said case, there was amputation of the wrist, whereas in this case, the respondent had suffered fracture of the leg. It was also submitted that while persons suffering from schedule injuries did not have to prove loss of earning capacity, but in this case as the respondent had suffered non-scheduled injury of fracture, he had to lead evidence to prove loss of earning capacity. It was also submitted that the Commissioner did not have the jurisdiction to deviate from the specified percentage of loss of earning capacity as prescribed in the schedule. Moreover, with reference to the provision of section 2(g) of the EC Act, it was submitted that if for non-specified injury, loss of earning capacity is accepted as 100%, it would result in obliteration of difference between "partial disablement" and "total disablement". Accordingly, it was submitted that his submission was to the effect that the case of *Pratap Narain Singh Deo (supra)*, perhaps did not lay down the correct law and accordingly, it was further submitted that the said decision should be read to be *qua* facts of the said case. The learned counsel for the appellant had also submitted a written note of submissions, which is made a part of the record.

11. The Court is inclined to accept the submissions made by the learned counsel for the appellant that as per Part-I of Schedule-I to the EC Act,

if a person suffered double amputation through leg or thigh, or amputation through leg or thigh on one side and loss of other foot, the percentage of loss of earning capacity is prescribed at the rate of 100%. Therefore, when functional disability of the respondent was assessed as 50% because of fracture suffered in his leg, loss of earning capacity cannot be assumed at 100% in every employment which he was capable of undertaking at the time. We may extract the provisions of section 2(g) and 2(l) and 4(1)(c) of the EC Act, which reads as under:-

> *(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;*
>
> *(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 percent or more;*
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> *4. **Amount of compensation.**-*
>
> *(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-*
>
> *(a) * * **
>
> *(b) * * **
>
> *(c) where permanent partial disablement result from the injury*
>
> *(i) in the case of an injury specified in Part II of 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 (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;

12. Thus, from the above, it is seen that the provisions of section 2(g) of the EC Act contains reference to all kinds of employment which the employee was capable of undertaking at the time of accident. However, in the provision of section 2(l) of the EC Act, there is a reference to all kinds of work the employee was capable of performing. Thus, the provision of section 2(g) and 2(l) of the EC Act carves out a distinction when reference is made to "partial disablement" and when reference is made to "total disablement".

13. The Court also finds force in the submissions of the learned counsel for the appellant that when an employee suffers from injuries resulting in "permanent total disablement", which are described in Schedule-I, Part-I, the percentage of loss of earning capacity is 100%, as prescribed by the EC Act. However, when an employee suffers from injuries resulting in "permanent partial disablement", which are described in Schedule-I, Part-II, the loss of earning capacity is not 100%, but it is factored lower than 100%. In this case in hand, the nature of injuries that the respondent had suffered, i.e. fracture in the leg, appears to be an injury which is not covered either by Schedule-I, Part-I or by Schedule-I, Part-II of the EC Act. Therefore, the respondent was required to prove the loss of earning capacity in reference to nature of work which he was capable of doing at the time of the accident, as provided under section 2(l) of the EC Act.

14. Therefore, as the Commissioner, Workmen's Compensation had assessed the loss of earning capacity of the respondent at 100%, although the injuries suffered by the respondent was not covered by Schedule-I, Part-I or Schedule-I, Part-II of the EC Act, which was done without taking into consideration the nature of work which the respondent could have performed at the time of the accident, the Court is inclined to hold that the Commissioner, Workmen's Compensation had not computed compensation in accordance with the scheme of the EC Act.

15. In this regard, the Court is persuaded to follow the decision of this Court that was rendered in the case of *Bimal Nath (supra)*, in respect of the observations made regarding the scope of section 4(1)(c)(ii) of the EC Act relating to non-schedule injury. We also reiterate the observations made therein to the effect that before assessing compensation, the Commissioner is required to find out if the earning capacity of the workman has been reduced in every employment that he was capable of doing at the time of the accident and/or if the earning capacity of the workman has been reduced in every work that he was capable of doing at the time of the accident, depending on the nature of disability referred to in section 2(g) and 2(l) of the EC Act, as discussed herein before.

16. In view of the discussions above, the substantial question of law is decided in the affirmative and in favour of the appellant by holding that the learned Commissioner, Workmen's Compensation, Golaghat, had erred in assessing the amount of compensation by erroneously accepting the loss of earning capacity of the respondent- claimant to be 100% in disregard to the principles contained in section 4(1)(c) of the Workmen's Compensation Act (now Employees' Compensation Act, 1923).

17. In light of the discussions above, this appeal stands allowed. Resultantly, the impugned order and award dated 09.07.2010, passed by the learned Commissioner, Workmen's Compensation, Golaghat in W.C. Case No. 60/2008 is set aside and the matter is remanded back to the Commissioner, Employees' Compensation, Golaghat for a fresh decision by determining compensation in accordance with law, by taking into account the nature of injury.

18. The parties are left to bear their own cost.

19. Let the LCR be sent back expeditiously.

20. The appellant, who is represented by its learned counsel shall appear before the Commissioner, Workmen's Compensation, Golaghat on 22.01.2024 and by producing a certified copy of this judgment and order, seek further instructions from the said learned Commissioner.

JUDGE

Comparing Assistant