IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 15TH MARCH 2006 / 24TH PHALGUNA, 1927

MFA.No. 847 of 1998(A)

WCC.129/1991 of W.C.C.,ERNAKULAM
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APPELLANT:

THE ORIENTAL INSURANCE CO. LTD., DIVISIONAL OFFICE.2., M.G.ROAD, ERNAKULAM, REPRESENTED BY THE ADMINISTRATIVE OFFICER, MOTOR THIRD PARTY CLAIMS CELL, M.G.ROAD, ERNAKULAM, COCHIN-682 035.

BY ADV. SRI.M.JACOB MURICKAN

RESPONDENTS:
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1. K.RAMESAN, S/O.KUNJAN, KALATHIL HOUSE, VAYALAR, CHERTHALA.

2. P.J.FRANKLIN, PAYAPPILLY HOUSE, FORT KOCHI-682 001. (DELETED).

THE NAME OF THE 2ND RESPONDENT IS DELETED FROM THE PARTY ARRAY AS PER ORDER DATED 7.3.2005 IN IA.296/05.

BY ADV. SRI.KRB.KAIMAL

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 15/03/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

M.F.A.NO.847 OF 1998

Dated this the 15th day of March, 2006

JUDGMENT

The respondent filed an application under Section 22 of the Workmen Compensation Act ('the Act', for short) claiming Rs.50,000/- as compensation for the disability resulting from the injury sustained in an accident arising out of and during the course of employment as driver of the bus owned by the second respondent.

2. The respondent examined himself as AW1 and marked Exhibits A1 to A6 on his side. To prove his case he referred the report of the Medical Board. The appellant injured who was the second opposite party before the Commissioner for Workmen Compensation admitted the insurance and disputed all other relevant facts stated by the applicant in support of his claim. The Commissioner raised four issues and found that the first respondent sustained personal injury in an accident arising out of and during the course of his employment as driver under second respondent herein, and that the first respondent is a workman as defined under the Act. It is also found that the employer is liable to pay compensation under the Act for the disability sustained in accordance with the provisions of the Act.

3. The loss of earning capacity as provided under the schedule to the Act was taken as 30% to assess the compensation payable to first respondent. A total amount of Rs.49,726/- with 12% interest was ordered to be paid by the appellant-Insurance Company with cost. The said is under challenge.

4. Substantial question of law raised in this case is with respect to the legality of the order of the Commissioner in holding that the loss of earning capacity of the first respondent was at 30% as against the loss of earning capacity shown in the Medical Certificate, Exhibits C2, issued by the Medical Board which is only as 20%. On going through the impugned judgment, it can be seen that though the loss of earning capacity was assessed as 20% by the Medical Board, which examined the first respondent as per order of the Commissioner, the Commissioner found that the injury sustained by the first respondent is loss of vision of right eye as per Exhibit C2 and other medical records which come under item 26 of Part II of Schedule I to the Act. Hence, going by the above schedule, the loss of earning capacity was fixed as 30%. This was done evidently as per the provision contained in Section 4(1)(c)(i) of the Act. The said provision reads as follows:

> "4(1)(c)(1). 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;"

5. It is clear from Section 4(1)(c)(i) of the Act that when there is a permanent partial disablement, resulting from injury and the injury is one specified in Part-II of Schedule I to the Act, the compensation which can be awarded is 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. Item No.26 in Part II of Schedule I to the Act is "loss of vision of one eye, without complications or disfigurement of eye-ball, the other being normal". Only if the Commissioner holds that the injury is of the nature stated in item No.26 in Part II of Schedule I, the percentage of loss of earning capacity can be fixed as 30%, going by the schedule.

6. But, on going through the medical records, it is not clear whether the injury sustained by the first respondent is of the description in item No.26 in Part II of Schedule I. The Medical Board only certified as follows: "on examination his vision in the right eye is 6/24 not improving with glass. Vision in the left eye is 6/6. Fundus exam - showed clear media, normal disc and vessels, and dull macule with pigmantary deposits at macule. His visual disability is assessed to be 10%". It is doubtful, from the above passage quoted from Exhibit C2

whether there was a "loss of vision" of the right eye or whether it is only a visual disability, without any loss of vision. What is relevant is the "loss and not a mere disability or a defect in the vision. Without concluding whether the injury has resulted in loss of vision of one eye as stated in item No.26 of Part II of Schedule-I to the Act, it will not be legal to fix the loss of earning capacity at 30% going by Schedule-I.

7. The Commissioner, however, as per judgment under challenge, has held, "the prominent disability shown in the certificate is loss of vision of the right eye not improving with glass". It cannot be concluded whether this factual finding is consistent with the details in the certificate, Exhibit C2, unless a clarification is sought for from the Medical Board whether the defect reported in the certificate amounts to a "loss of vision" as stated in item No.26 of Part-II of Schedule-I. The finding arrived at by the Commissioner, therefore, cannot be said to be based on the evidence on record and hence such finding is not sustainable.

8. Unless and until it is found that the injury sustained by the first respondent has resulted in such disability as stated in such the schedule, the Commissioner cannot ought not to have applied Section 4(1)(c)(i) of the Act to the facts of this case. The appellant has raised a contention that the accident occurred prior to the coming into force of the

Amendment Act 30 of 1995 and therefore the Commissioner has to go by the unamended Act. But the Commissioner in this case has fixed the compensation applying the provisions in the amended Act which, according to the appellant, is not legal. Since I am remanding the case, the Commissioner is directed to consider this issue also afresh on hearing both sides while assessing the compensation.

9. In the above circumstances, the order under challenge is liable to be set aside and I do so. The case is remanded for fresh consideration and disposal in accordance with law. The Commissioner will ascertain from the records and such additional evidence or report of the Medical Board and get clarification for the purpose of concluding whether the first respondent has sustained an injury as specified in Part-II of Schedule-I to the Act or not and proceed to consider the rival contentions in the light of such finding. Since the case is of the year 1990, the Commissioner is directed to dispose of the case within two months from the date of receipt of a copy of this judgment.

This appeal is allowed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

M.F.A.NO.847 OF 1998

JUDGMENT

15.3.2006