Madras High Court

The Managing Director vs Thiru.A.Kannan on 22 April, 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.04.2014

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

C.M.A.No.943 of 2014
M.P.No.1 of 2014

The Managing Director,
Tamil Nadu State Transport
Corporation (Salem) Ltd.,
Salem-7.

vs.

Thiru.A.Kannan

Civil Miscellaneous Appeal filed under Section 30 of the Employee's Com

For Appellant

J U D G M E N T

Respondent, a driver of TNSTC, Salem, who sustained injuries, in an accident, which occurred on 21.12.2011, when he was driving a Transport Corporation bus, bearing Registration No.TN 30 N 0329, has claimed compensation. According to him, he sustained grievous injuries, viz., (1) Abrasion over forehead and left knee, contusion over right thigh, right side of abdomen, (2) Traumatic right ileas gangrene. He was also hospitalized in Manipal Hospital, Salem, between 22.12.2011 and 02.01.2011, during which period, a surgery has been performed on 23.12.2011. Again, he was hospitalized in the same hospital, between 28.02.2012 and 10.03.2012 and another surgery has been performed on 28.02.2012. According to him, even after discharge, he has taken treatment, as outpatient, at Manipal Hospital, Salem. He has incurred a sum of Rs.1,79,445.45 towards medical expenses. He has filed W.C.No.299 of 2012, before the Deputy Commissioner of Labour, Salem, claiming compensation of Rs.10,00,000/-.

2. The employer, Tamil Nadu State Transport Corporation (Salem) Ltd., has opposed the claim petition, on the ground that the claimant was negligent in causing the accident and consequently, the liability to pay compensation. The Corporation has further submitted that the

respondent-employee had availed medical leave from 06.02.2012 to 02.06.2012 and also provided alternative employment, protecting his pay and that therefore, there was no loss to him. In the counter affidavit, there is a categorical assertion that the respondent cannot drive heavy vehicle.

3. Before the Deputy Commissioner of Labour, Salem, the respondent/claimant examined himself as AW.1 and reiterated the manner of accident. He also adduced evidence, regarding the nature of injuries, surgeries performed, during hospitalisation and the extent of disablement, which resulted, in future loss of earning. In support of his contention, Ex.P1 - FIR, Ex.P2 - Wound Certificate, Ex.P3 - Registration Certificate, Ex.P4 - Driving Licence, Ex.P5 - Ration Card, Ex.P6 - Lawyer's Notice, Ex.P7 - Acknowledgement Card, Exs.P8 & P9 - Discharge Summaries, Ex.P10 - Medical Bills, Ex.P11 - Salary Certificate, Ex.P13 - C.T.Scan, Ex.P14 - C.T.Scan Report and Ex.P15 - X-Rays, have been marked.

4. AW.2, is the Doctor, who clinically examined the respondent/claimant, with reference to the medical records, has deposed that the respondent/claimant has sustained traumatic right ileas gangrene and 30 Cms of intestine, has been removed. The above opinion is based on Ex.P13 - C.T.Scan, Ex.P14 - C.T.Scan Report and Ex.P15 - X-Rays. He has further opined that the respondent/claimant has suffered from stomach pain and loss of energy. The impression as per Ex.P14 - C.T.Scan Report, is as follows:

"IMPRESSION: Small bowel adhesion diluted bowl loops decreased mobility."

He assessed the disability the extent of disablement at 35% and issued Ex.P12 - Disability Certificate.

5. On behalf of the appellant-Tamil Nadu State Transport Corporation, Salem, no oral or documentary evidence has been let in.

6. On evaluation of pleadings and evidence, the Deputy Commissioner of Labour, Salem, held that the respondent/claimant has suffered permanent disablement and after referring him to the Medical Board, the employer, Transport Corporation has found him unfit to drive heavy vehicles, permanently and accordingly, provided him with an alternative job of helper, with pay protection. Upon consideration of oral and documentary evidence, stated supra, the Deputy Commissioner of Labour, Salem, has held that the respondent/claimant is eligible for compensation. However, reducing the extent of disablement to 30% and applying the structured formula, the Deputy Commissioner of Labour, has awarded a sum of Rs.2,24,260/-, towards loss of earning capacity, as hereunder:

Salary Rs.6,401/-

Age 36 Years Age Factor 194.64 Loss of Earning Capacity 30% Compensation 6401 x 60/100 x 194.64 x 30/100 Compensation Amount Rs.2,24,260/-

7. Though Tamil Nadu State Transport Corporation (Salem) Ltd., appellant herein, has contended that inasmuch as the respondent/claimant has been provided with an alternative employment and therefore, not entitled to claim compensation, the Deputy Commissioner of Labour, Salem, relying on a decision made in The General Manager, M/s.Tungabadra Minerals ltd., v. Sri.G.Ameer reported in 2007 LLR 1051, rejected the said objection and accordingly, awarded compensation of Rs.3,53,052/-, inclusive of compensation of Rs.1,28,792/- awarded towards medical expenses.

8. Assailing the correctness of the quantum of compensation, Mr.P.Paramasiva Doss, learned counsel appearing for the Tamil Nadu State Transport Corporation (Salem) Ltd., appellant herein, contended that the Deputy Commissioner of Labour, Salem, has grossly erred in computing the compensation, towards loss of future earning, by relying on Ex.P12 - Disability Certificate, without taking into account that the respondent/claimant has been provided with an alternative employment, as helper, with pay protection and that therefore, the surrounding circumstances ought to have been taken into consideration for the purpose of quantifying the loss of future earning capacity.

Heard the learned counsel for the appellant and perused the materials available on record.

9. The nature of injuries, which resulted in permanent disablement and the unfitness of the respondent, to drive heavy vehicle, for the rest of his service, has been admitted in the counter affidavit, filed by the the Tamil Nadu State Transport Corporation (Salem) Ltd., appellant herein. It is also admitted that the respondent/claimant has been provided with an alternative employment of helper, with pay protection.

10. The contention, as to whether, the respondent/claimant is disentitled to claim compensation, on account of alternative employment, provided to him, has been repelled in the judgment of the Karnataka High Court in General Manager, Tungabadra Minerals Ltd., v. G.Ameer reported in 2008 ACJ 1953, wherein, the Karnataka High Court held as follows:

"10. A perusal of the afore-referred reported decisions reveals that certain distinction has to be made between the loss of earning and loss of earning capacity. Entitlement to compensation is not lost merely on account of retention and even of promotion in the same establishment. The entitlement to compensation under the Act cannot be denied or postponed depending on the present or future earning. The total amount that a workman can get is fixed by the Act; the same depends upon the difference between his wage earning capacity before the accident and his wage earning capacity after the accident. The provisions of beneficent legislation are to be constructed so as to advance the beneficent purpose."

It is worthwhile to extract the decisions considered in Tungabadra Minerals' case (cited supra), as follows:

> "5. .....a Division Bench judgment of High Court of Judicature at Madras in the case of The Management of Sree Lalithambika Enterprises, Salem v. S. Kailasam reported in 1986 ACJ 1150 (Mad.). The relevant paragraph is extracted herein below:
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> 10. Coming to the scope of Section 4(1)(c)(ii) of the Act, we are the view that the loss of earning power should not be confined only to the present capacity because it is contended by the management that at the same salary the workman is continued in employment. That will be only begging the question. If this were to be the law, the employer can easily evade the provisions of the Act by continuing the employment of the same terms as was enjoyed by the workman prior to the accident. Therefore, we are unable to agree with the view taken by the Punjab High Court in Sewa Singh v. Indian Hume Pipe Co., (supra). Nor again can it be said that if in future the workman is compelled to seek employment at reduced wages he can claim compensation. That would only result in the negation of the beneficial provisions of the Act which are intended to benefit unfortunate workman like the respondent herein. Added to this, should the management wind up its business, the workman will be in the lurch because no person with his eyes open will give employment to a person who had suffered an injury of this kind. Therefore, this is clearly a case to which Section 4(1)(c) (ii) of the Act would apply. Consequently, we agree with the judgment forming the subject-matter of the appeal.
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> 6. ....a Division Bench judgment of Kerala High Court in the case of Mohammed v. Cochin Port Trust reported in 2002 ACJ 1039 (Kerala), wherein it is held that compensation for permanent disablement suffered by workman in the course of his employment, as a result of employment injury, has to be paid independent of compensation for the period during which he could not attend to his duties due to temporary disablement.
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> 7. ...a decision of the Apex Court in the case of Kunal Singh v. Union Of India reported in (2003-II LLJ 735), wherein it is held that giving invalidity pension to a person is no ground to deny the protection which is mandatorily available to him under some other statute.
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> 8. ....a judgment of the Orissa High Court in the case of Executive Engineer, O.S.E.B. v. Keder Charan Lenka reported in 1997 LAB.I.C.37 : 1997 ACJ 869 (Orissa), Para-5 of the said judgment is extracted herein below:
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> 5...Legislative intent is to consider the loss of earning capacity in the case of permanent/partial disablement. The effect of any temporary engagement and/or temporary job may practically consult in no reduction in emolument. That does not have any determinative effect. Plea of the Board and its functionaries is without any

merit.

9. It is also worthwhile to refer to a Division Bench judgment of Gujarat High Court in the case of State of Gujarat v. Rajendra Khodabhai Deshdia reported in (1995) III LLJ 211 Guj, wherein it is held that the workman is entitled to secure compensation for the loss of earning capacity which is different from earning; earning capacity need not be confused with earning; earnings may increase on account of the general conditions of employment."

11. Though the decision made in United India Insurance Company v. Veluchamy reported in 2005 (1) CTC 38 (DB), has been decided, in a matter, arising under the Motor Vehicles Act, 1988, yet it is worthwhile to consider the observations of the Hon'ble Division Bench and at paragraphs 8 to 10 of the judgment, it is observed as follows:

"8. Money cannot renew a physical frame that has been battered and shattered. All the Judges and Courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. In personal injury cases the Courts should not award merely token damages but they should grant substantial amount which could be regarded as adequate compensation. The general principle which should govern the assessment of damages in personal injury cases is that the Court should award to injured person such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries. But, it is manifest that no award of money can possibly compensate an injured man and renew a shattered human frame....

9. In an accident, if a man is disabled for a work, which he was doing before the accident, that he has no talents, skill, experience or training for anything else and he is unable to find any work, manual or clerical, such a man for all practical purposes has lost all earning capacity he possessed before and he is required to be compensated on the basis of total loss. An injured person is compensated for the loss which he incurs as a result of physical injury and not for physical injury itself. In other words, compensation is given only for what is lost due to accident in terms of an equivalent in money in so far as the nature of money admits for the loss sustained. In an accident, if a person loses a limb or eye or sustains an injury, the Court while computing damages for the loss of organs or physical injury, does not value a limb or eye in isolation, but only values totality of the harm which the loss has entailed the loss of amenities of life and infliction of pain and suffering: the loss of the good things of life, joys of life and the positive infliction of pain and distress.

10. In estimating the financial or pecuniary loss, the Court must first form an opinion from the evidence and probabilities in the case, of the nature and extent of the loss. While estimating the loss of earnings, the Court must first decide what the claimant

would have earned if the accident had not happened, allowing for any future increase or decrease in the rate of earnings. It is also necessary for the Court to decide how long the loss will continue, whether there is incapacity for life or for a shorter period. The Court should also make an estimate of the amount, if any, which the claimant could still earn in future, notwithstanding disabilities sustained by him in the accident. Further, in a case where the claimant claims medical and nursing expenses, the Court must find as a fact what expenses have already been incurred and must estimate from the evidence the expenses which will be incurred in future. Future promotions, increments, revisions of pay are in the domain of many imponderables and the Court should bear them in mind while assessing future loss of income. While estimating future loss of income, the Court can take into account the future prospects of the injured or the deceased of earning more income by way of promotions or otherwise."

(emphasis supplied)

12. In yet another judgment made in New India Assurance Company Ltd., v. Ponammal reported in 2004 (1) TNMAC 42 (DB), a Hon'ble Division Bench has held as follows:

"17. Where the Commissioner has to deal with cases of permanent partial disablement inflicted by injuries which are not scheduled, the provisions of Section 4 (1) (c) (ii) of the Act are attracted, and the Commissioner has to assess the compensation in terms of those provisions. In assessing the compensation in such cases, the most important and paramount thing that the Commissioner has to consider, is the loss of earning capacity. He has to consider,

(i) the nature of work that a workmen has to do;

(ii) the nature of the injury; and

(iii) other environmental circumstances.

The principles upon which the loss of earning capacity under Section 4 (1) (c) (ii) have to be determined are,

1. Loss of physical capacity is not coextensive with loss of earning capacity.

2. Loss of earning capacity is not coextensive with loss of physical capacity.

3. There may be cases where even the loss of physical capacity may be of such nature as to make it abundantly clear that there has been large, if not complete, loss of earning capacity even though there has been no immediate reduction in wages.

Medical evidence by itself is not conclusive or decisive factor in the loss of earning capacity. It can only establish the nature of disablement or the physical injury. But to what extent the physical disablement causes loss of earning capacity is not for medical evidence to state. It is for the Commissioner to settle in case of a dispute between the parties, and such settlement can only take placed upon the basis that-

(a) there has been a loss of earning capacity caused by the said injury, and

(b) the estimate that should be made of such loss of earning capacity, should be proportionate to the loss of earning capacity caused by the injury.

18. It is settled in series of decisions that the determination of the loss of earning capacity of a man/woman is a question of fact and is at the same time not a very easy matter. Where the case is not one of a scheduled injury, the reduction in earning capacity will have to be proved as a fact. The loss of earning capacity is not necessarily co-extensive with the loss of physical capacity. Undoubtedly, when Doctors disagree, the Judge has to exercise his own decision. The Act is not interested in mere physical disability. No compensation can be granted for any physical disability unless there was loss of earning capacity. In the case of non scheduled injury, the loss of earning capacity can not be proved by mere medical evidence. It must be proved by evidence, which will establish that the workman was, as a result of the injury, unable to earn as much as he did before. This is a question of fact and has to be proved by evidence like any other question of fact. There can be no doubt that medical evidence as its own value in calculating the capabilities of the man both before and after the accident. But it has been pointed out in several cases that the arbitrator, namely, Commissioner should not attach too much importance to this evidence nor decide the case solely on the case of such witness. The Doctors very well estimate the loss of physical capacity for work, but the loss of earning capacity must be estimated by some other person. The best estimate that can be given is by those people who would have the opportunity of seeing the workman work before and after the accident. The workmen Compensation Act is not concerned with physical injury as such nor with the mere effect of such injury on the physical system of the workmen, but it is concerned only with the effect of injury or of the diminution of the physical powers caused thereby on the earning capacity of the affected workman. To what extent the earning capacity has been affected, it can never be for a medical witness to say. Medical evidence is opinion evidence and it is only with regard to the physical aspect of the injuries that the opinion of a medical witness is relevant and admissible as the opinion of an expert. But, the loss of earning capacity is not a matter of medical opinion and is not a matter to which a medical witness can possibly speak. 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.

19. In the light of the above discussion and in view of the statutory provisions, more particularly, Section 4(1)(c)(ii) and Explanation n, as well as the evidence of the

applicants, experts, namely, Dr. R. Kandasamy and Dr. Madhumathi, wound certificates and disability certificates etc., we are satisfied that there is no valid ground for interference. We have already held that assessment of the loss of earning capacity is a question of fact and the same depends upon the factual materials placed before the Authority. In the light of the first proviso to Section 30 of the Act, we do not find any substantial question of law for interference in these appeals. We have already referred to the fact that the appellant has not raised any other contention, except the question relating to the loss of earning capacity. "

13. On the question, as to whether, the mandate under the Workmen's Compensation Act, for the injuries or disablement or other pecuniary losses, sustained by a workman, would be a bar to claim the benefits under the provisions of Persons with Disabilities (Equal Opportunities, Protection of Rights, Full Participation Rights) Act, 1995, to provide an alternative employment, under Section 47 of the Act, it is worthwhile to consider a decision of this Court in Rajamanu v. State Express Transport Corporation Ltd., reported in (2004) 1 TN MAC 295, wherein, the workman, on account of an injury, was found to have suffered 35% disability and one of the questions of law, raised before the Deputy Commissioner of Labour, was that, whether the workman was entitled to the benefits under both the Acts. In the said case, a conductor, who was found not suitable for the said post, on medical invalidation, was appointed as a helper. For better understanding, the issue framed by this Court is extracted hereunder:

"Issue No. (i): Whether the award of compensation by the Commissioner under the provisions of the Workmen's Compensation Act, is a bar to the petitioner to seek the relief under the provisions of the Disabilities Act? "

Whether the award under the workmen's Compensation Act, is a bar for an employee to seek for compensation under the Persons with Disabilities Act. This Court, at Paragraphs 6.2 and 6.3, observed as follows:

"6.2. The Workmen's Compensation Act was enacted to provide for the payment, by certain classes of employers to their workmen, of compensation for injury by accident, provided such accident had taken place during the course of their employment and the workmen have suffered a disablement whether partial or permanent. Whereas, Disabilities Act was enacted to provide for the following:

(i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of person with disabilities;

(ii) to create barrier free environment for persons with disabilities;

(iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-vis non-disabled persons;

(iv) to counteract any situation of the abuse and the exploitation of persons with disabilities;

(v) to lay down a strategy for comprehensive development of programmmes and services and equalisation of opportunities for persons with disabilities; and

(vi) to make special provision of the integration of persons with disabilities into the social mainstream.

6.3. Even though the Acts referred to above come under one umbrella, viz., welfare legislation, and differ in their object. The benefits conferred under the Disabilities Act is in addition to the Workmen's Compensation Act and not in derogation of the same, as evident from Section 72 of the Disabilities Act, which reads as follows:

Section 72: Act to be in addition to and not in derogation of any other law The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefits of persons with disabilities. 6.4. Issue No. (i) is answered in negative."

After considering Section 47 to 72 of the Disabilities Act and the decisions made in Narendra Kumar Chandla v. State of Haryana [JT 1994(2) SC 94] and Kunal Singh v. Union of India [2003 (2) Supreme 102], this Court, held as follows:

"8.1. Issue No. (iii): Whether the appointment of the petitioner by the impugned proceedings of the respondent Corporation in the post of Helper as a fresh entrant, based on the G.O.Ms. No. 746, Transport Department dated 2.7.1981 is valid in law?

8.2. In this regard it is relevant to refer Section 47 of the Act, which reads as follows:

Section 47: Non-discrimination in Government employments- (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(3) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment by notification and subject to such conditions, if any, as ay be specified in such notification exempt any establishment from the provisions of this Section. (emphasis supplied) 8.3. The Apex Court, in Narendra Kumar Chandla v. State of Haryana , JT 1994(2) S.C. 94, held as follows:

Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the posts he was holding the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties. ....

An employee cannot be thrown out and that the employee has to be given light duty of alternate duty, which may suit his health conditions and that he should be given pay protection also. 8.4. Again the Apex Court in Kunal Singh v. Union of India , 2003 (2) Supreme 102, interpreting Sections 47 and 72 of the Act, held as follows:

9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2 of the Act has given distinct and different definitions of disability and person with disability . It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads no establishment shall dispense with, or reduce in rank, an employee who acquires a disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the employee against an y post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this, no promotion shall be denied to a person merely on the ground of his disability as is evident from subsection (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is

plain and certain statutory obligation on the employer to protect an employee acquiring disability during service.

10. The argument of the learned counsel for the respondent on the basis of definition given in Section 2(t) of the Act that benefit of Section 47 is not available to the appellant as he has suffered permanent invalidity cannot be accepted. Because, the appellant was an employee, who had acquired disability within the meaning of Section 2(i) of the Act and not a person with disability.

11. We have to notice one more aspect in relation to the appellant getting invalidity pension as per Rule 38 of the CCS Pensions Rules. The Act is a special Legislation dealing with persons with disabilities to provide equal opportunities, protection of rights and full participation to them. It being a special enactment, doctrine of generalia specialibus non derogant would apply. Hence Rule 38 of the Central Civil Services (Pension) Rules cannot override Section 47 of the Act. Further Section 72 of the Act also supports the case of the appellant, which reads:

Section 72: Act to be in addition to and not in derogation of any other law- The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefits of persons with disabilities. (Emphasis supplied) 8.5. Following the above decisions of the Apex Court, this Court also granted relief to the employees who suffered disability by reinstating them in suitable alternative post, by orders dated 13.12.1999 made in W.P.No.13408 of 1999, 11.8.2003 made in W.P.No.40270 of 2002 and 16.3.2004 made in W.P.No.8214 of 1999 and 25.3.2004 made in W.P.No.12356 of 2003.

8.6. It is a trite law that the disabled employee is entitled to be posted in the same scale of pay and service benefits and if it is not possible to adjust the employee against that post, he must be kept on supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier, and that no promotion shall be denied to the person merely on the ground that he was disabled.

8.7. There cannot be any doubt that the respondent should not dispense with the service of the petitioner nor reduce his rank, as it is not in dispute that he acquired the impugned disability during his service and he is entitled to some other post with the same pay scale and service benefits. Further, if it is not possible to adjust the petitioner in any post, he should be kept on supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier, and his promotion shall not be denied merely on the ground of disability, as per Section 47 of the Disabilities Act.

8.8. In the circumstances, I am constrained to interfere with the impugned proceedings insofar as the appointment of the petitioner in the post of Helper as a

fresh entrant is concerned and direct the respondent Corporation to pass appropriate orders in terms of Section 47 of the Disabilities Act, within a period of thirty days from the date of receipt of a copy of this order. "

14. From the above judgment, it could be deduced that notwithstanding the compensation awarded under the Workmen's Compensation Act, it is held that an employee is entitled to the benefits under the Disabilities Act, which means, that he is entitled to benefits, under both Acts. Converse is the case on hand.

15. In a recent decision made in Palraj v. North East Karnataka Road Transport Corpn., (2010) 10 SCC 347, a driver sustained injuries, in the accident. The medical officer who examined the appellant therein, came to the conclusion that the appellant had suffered 65% of total body disability and 20% of functional disability. The Commissioner, Workmen s Compensation, however, took 85% as functional disability for quantifying the compensation payable to the appellant, who was admittedly drawing a salary of Rs.15,000 per month on the date of the accident and accordingly, awarded compensation. Being aggrieved by the same, North East Karnataka Road Transport Corporation has preferred an appeal and got the award passed by the Commissioner for Workmen s Compensation, modified by taking into account 20% of the disablement alone. Being aggrieved by the same, the driver took the matter on appeal, wherein, a contention has been raised by the Corporation that the driver has been given alternative employment as peon, in the establishment of the Corporation and also paid the same salary, which he would have drawn, if he had continued to be a driver and therefore, he did not suffer any loss of earnings. On the above contentions, the Hon ble Apex Court, at Paragraphs 12 and 13, held as follows:

"12. While computing compensation for disabilities being suffered by a workman in the case of his employment, it is the functional disability resulting in loss of earning capacity which is the criteria which is followed in assessing compensation. The Workmen s Compensation Act, 1923, hereinafter referred to as the 1923 Act , has its own formula in computing compensation on account of injuries suffered during employment which is reproduced in Schedule I to the said Act. In Part II of the said Schedule the loss of earning capacity in terms of percentage has been directly related to the loss of any of the limbs and parts thereof, both of the upper limbs as also the lower limbs. Loss of earning capacity is commensurate to the injuries suffered and the loss of earning capacity as a result thereof.

13. In the instant case, it is no doubt true that the appellant has lost his capacity to function as a driver, but with the help of external aids his mobility has, to some extent, been restored and he is able to perform work which is suitable to his physical condition after the accident."

On the aspect, as to whether, provisions for alternative employment under Section 47 of the Persons with Disabilities Act, is a bar and whether an employee is disentitled from claiming compensation,

under the Workmen s Compensation Act, the Apex Court, at Paragraphs 20 to 22, held as follows:

"20. We are satisfied that the impugned order of the High Court was only an attempt to correct the erroneous interpretation of Part II of Schedule I of the Workmen s Compensation Act, 1923 by the Commissioner, Workmen s Compensation. The loss of earning capacity has to be computed keeping in mind the alternate employment given to the appellant on the same salary as he was enjoying while performing the duty of a bus driver. The same cannot be ignored in computing the amount of compensation which the appellant was entitled to.

21. In that view of the matter, we are in agreement with the order passed by the High Court, but we are of the view that the percentage of functional disablement has to be modified from 20% to at least 35%, having regard to the appellant s mobility on account of the medical treatment received after the accident and also because of the appellant s loss of future earnings and also promotion.

22. We, therefore, maintain the order of the High Court and direct that the appellant be provided with compensation on the basis of functional disability to the extent of 35% and not 20% as indicated by the High Court."

16. As observed by the Apex Court, the benefits conferred on an employee, under the abovesaid statutes, are distinct, but at the same time, while computing the loss of earning capacity, the competent authority and the Court, has to consider the fact that the employee has been provided with an alternative employment, and accordingly, assess the loss of earning capacity. In the above reported case, the Apex Court, restored the extent of disablement to 35%. In the present case, the Deputy Commissioner of Labour, Salem, has assessed the loss of earning capacity to 30% only.

17. In the light of the above decisions, this Court is of the view that the substantial questions of law, framed by the Transport Corporation, in the present appeal, is answered in the negative. Admittedly, had the respondent/claimant continued as a driver, he would have been entitled to batta and other emoluments, apart from his monthly salary, attached to the said post and on account of his permanent disablement and the consequential declaration, as unfit to drive heavy vehicles, he has been deprived of the same, though he has been provided with an alternative job, as a helper.

18. Judicial notice can be taken that under the Transport Corporation Service Rules, a driver is eligible to be considered for promotion to the post of Driving Instructor and thereafter, to the post of Traffic Manager, subject to satisfying the service rules. It should be noted that at the time of accident, the respondent/claimant was aged just 37 years. Had he continued in service as a driver, he would have been considered for the promotional posts.

19. In the case on hand, after medical invalidation, the respondent/claimant has been provided with an alternative job of helper. Needless to say that there is a vast difference between the two categories of posts, helper and driver, and the chances of promotion, disparity, in the salary structure in the promotional posts, emoluments and other benefits.

20. Loss of earning capacity, on account of permanent disablement, suffered by the respondent/claimant, is per se apparent and it can be measured, with reference to the employment or job, which the injured was performing, at the time of accident. Estimation can also be made, with reference to likelihood of future prospects, by promotion or other benefits, available to the employee, which he would have gained, but for the permanent disablement suffered, on account of the accident. Of course, such prospects or likelihood of getting the benefits, should not be remote, ie., after a long period.

21. The respondent/claimant, being a driver, at the age of 37 years, has to work as a helper to others, till he is considered for appointment to the next promotional post. Thus, in the light of the discussion and decisions, this Court is of the view that the extent of disablement of 30%, taken into consideration, by the Deputy Commissioner of Labour, for the purpose of assessing the loss of earning capacity, on the basis of medical records, cannot be said to be grossly excessive, warranting interference.

22. The Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

22.04.2014 Index: Yes Internet: Yes skm To The Employee's Compensation Commissioner Tribunal/ Deputy Commissioner of Labour, Salem.

S. MANIKUMAR, J.

skm C.M.A.No.943 of 2014 22.04.2014