
(1995) 08 MP CK 0008
In the Madhya Pradesh High Court

National Insurance Company Ltd.

APPELLANT

Vs

Jugalkishore and Others

RESPONDENT

Date of Decision : 30-08-1995

Acts Referred:

Motor Vehicles Act, 1988 — Section 110(c)(2)(a)

Citation : (1996) 1 ACC 245

Hon'ble Judges : R.D. Shukla, J;A.R. Tiwari, J

Bench : Division Bench

Judgement

R.D. Shukla, J.—This appeal is directed against the judgment and award dated 31.3.1987 of III M.A.C.T., Indore passed in Claim Case No. 112/81 whereby the claimant respondent No. 1 has been awarded a compensation of Rs. 1,02,300/- in all for sustaining injuries in a motor accident on 8.12.80. This appeal has been filed by Insurance Company challenging the factum of negligence and quantum of amount of compensation.

2. The brief history of the case is that claimant respondent No. 1 was going on scooter CPE 1662 to Professor's Colony and while proceeding as such happened to pass through Tagore Marg, the truck No. DHL 188, driven by respondent No. 2 and owned by respondent No. 3 came with high speed and gave a dash to the scooter near Orient Mail Speed Office on Snehnagar Road. The claimant sustained injuries on head, left leg, chest, shoulders, both hands and other parts of body. He became unconscious, taken to hospital. He has sustained injuries and therefore, he was kept under plaster. Thereafter he developed bed sore and grafting had to be done. He remained in hospital from 18.12.1980 to 18.3.1981. Plaster was removed on 17.4.1981. The claimant had to spend money for treatment, special diet communication and keeping attendant. He had to remain in pain and suffering for about 6 months. There has been a shortening of leg by 1 1/2 and has developed obstruction in movement of leg from the knee. The claimant was working with one Naraindas. He could not attend that work not could do his own business. His scooter was also damaged. He had spent Rs.

3,000/- for the same. Claimant prayed for a compensation of Rs. 1,50,000/-. The respondents Nos. 2 and 3 who were N.A. Nos. 1 and 2 remained ex-parte. The case was contested by Insurance Company with whom the vehicle was insured at the time of accident.

3. Learned Tribunal found accident because of rash and negligent driving of the vehicle by respondent No. 2 Driver of truck and further found that claimant had to remain out of work for about 6 months. He had to undergo traction and had to remain under plaster.

Learned Tribunal awarded compensation as follows:

1. For treatment ?Rs. 15,000/- 2. For pain, suffering and mental agony ?Rs. 10,000/- 3. Disability ?Rs. 25,000/- 4. Loss of pay ?Rs. 6,000/- 5. Future loss ?Rs. 30,000/- 6. Disability for bed sore ?Rs. 15,000/- 7. Repairs of scooter ?Rs. 1,300/- _____ ?Rs. 1,02,300/-
_____ This appeal has been filed by the Insurance Company.

4. Contention of learned Counsel for appellant is that the compensation granted is on higher side and that compensation on the same head has been awarded twice. The liability of the Insurance Company was limited to Rs. 50,000/- only.

Learned Counsel for respondent has taken preliminary objection that the appeal by Insurance Company as they had not obtained permission to contest the case for and on behalf of owner and driver of the vehicle, is not maintainable, and that the defence open to Insurance Company is limited to Section 110(C)2(a) of the M.V. Act, only.

5. The contention of learned Counsel for appellant is that the policy was produced in the Court and exhibited, it was admitted by the claimants and, therefore, there was a deemed permission and the appeal would not be incompetent in absence of formal permission for raising the defence open to driver and owner of the vehicle. It has also been contended that Section 110-B of M.V. Act speaks of just compensation. Section 110(c)(2)(a) has been introduced in 1970 but that does not change the nature as only just compensation can be permitted to be awarded. He has referred to Section 110(d) of the M.V. Act also. He has referred a case reported in The Oriental Fire and General Insurance Company Ltd. Vs. Rajrani Surendrakumar Sharma and Others, whereby a Division Bench of that High Court has held as under:

Section 110-C(2-A) provides that if the person against whom the claim is made has failed to contest the claim and if the insurer is not a party, the Court may, for reasons to be recorded by it in writing, direct that the insurer who may be made liable in respect of such a claim shall be impleaded as a party. The insurer so impleaded thereupon gets the right to contest the claim on all ground available to the person against whom the claim is made. In case where the insurer is already a party there is no question of the Court recording any reasons in writing and directing the insurer to be made a party. The insurer is already a party.

Therefore, by virtue of the provisions of Section 110C (2A) once the insurer is a party, whether pursuant to a notice of the Court or otherwise, and the person against whom the claim is made does not contest the claim, the insurer gets a right to contest this claim on all grounds available to the person against whom the claim is made.

He has also referred a case reported in *New India Assurance Co. Ltd. Vs. Bhagaban Bhuyan and Another*, and submitted that there was no effective participation by the owner of the vehicle and the compensation awarded is illusory and, therefore, Court can interfere the same. In this case the driver and owner have remained *ex parte*. There was no effective participation by owner and driver but it was incumbent upon the Insurance Company to have sought permission from the Court (*sic.*) owner and driver as well. In the absence of special possession, the Insurance Company cannot be allowed to take defences which otherwise were not open to it on the ground of deemed permission. The claimant cannot be taken unaware and unnoticed. It is for the Insurance Company to file application and thereby should have brought the fact to the notice of the claimant so that the claimant could adduce evidence accordingly.

6. In a case reported in *Oriental Fire and Genl. Ins. Co. Ltd. v. Rajendra Kaur* 1989 ACJ 961 (Allahabad High Court), a Division Bench has held that where owner remained *ex parte* and claimant did not object to the Insurance Company taking the defence beyond the scope of Section 96(2) and claimant's witnesses were cross-examined by the insurer on the lines much beyond the scope of Section 96 and to formal order has been recorded by the Tribunal in writing allowing the Insurance Company to take defence available to the owner will be deemed that the Insurance Company has been permitted to contest the claim on those grounds which were available to the owner.

Full Bench of Orissa High Court in a case reported in *National Insurance Co. Ltd. v. Magikhia Das* 1979 ACJ 239 has held that the Insurance Company can defend on other grounds in the name of insured provided leave of the Claims Tribunal is taken u/s 110-C(2A) of the Act.

Thus the crux of the matter ultimately would be whether a permission has been taken by the Insurance Company for raising defence available to the owner and driver of the vehicle.

7. This High Court in a case reported in *Unitd India Insu. Co. v. Pratibha* 1995 MPLJ 250 has held as under:

Section 96(2) of the M.V. Act, 1939, bars the insurer from raising any defence to the claim for compensation, not permitted by Clauses (a) to (c) therein. There can be only two ways of overcoming the restrictions imposed by Section 96(2). The contract of insurance may stipulate that the insurer would be at liberty to raise all defences on behalf of the insured. In such a case, the insurer can raise all defences which are available to the insured without reference to the restrictions in Section 96(2). The restrictions will not apply because the defences

are raised on behalf of the insured. The second way is the one contemplated in Sub-section (2-A) of Section 110C of the Act. There is no provision in the Act which expressly or by necessary implication confines the restrictions of Section 96(2) only to the Forum of the Tribunal. In the circumstances, it must follow that the restrictions contained in Section 96(2) will apply in the Appellate Forum also. The insurer cannot file an appeal disregarding the restrictions on the defences contemplated u/s 96(2) of the Act.

8. In other case reported in *National Insurance Co. Ltd. v. Kamarjahan* 1995 J LJ 297 other Division Bench of this Court has held that permission to allow to contest on all grounds to the insurer should be in writing and cannot be deemed to have been granted even when insurer is allowed to lead evidence and cross-examine witnesses on all grounds available to the insured.

Thus settled view of this High Court is that where Insurance Company wants to take defence other than what is provided under u/s 110(2-A) [u/s replace with Under Section] is required to file application before the Tribunal and is further required to obtain permission in writing and unless that permission has been obtained, the Insurance Company cannot be allowed to raise defences available to owner and driver of the truck on grounds of deemed permission.

9. In view of above, the contention of learned Counsel for appellant cannot be accepted that there was a deemed permission because no objection has been made by the claimant and because of Insurance Company permitted to put questions in cross-examination which were otherwise available to owner and driver of the truck. In such a situation the Insurance Company in this case cannot be allowed to raise points otherwise not available to insurer.

10. Now so far as the amount of compensation is concerned, it has been found that claimant had to remain under plaster for about four months and he had to undertake treatment not only for the fracture sustained in accident but for the bed sore which he developed during his confinement to bed. Learned Tribunal has awarded Rs. 15,000/- for the expenses on the basis of the receipts produced and, therefore, the same calls for no interference. It is also not in dispute that the claimant must have been in great mental agony and pain during all these period and, therefore, Rs. 10,000/- awarded on that heading also appears to be just and proper. The claimant could not work for more than 6 months taking the normal earning even as a ordinary shopkeeper or servant of shop keeper, the income of Rs. 1000/- assessed appears to be correct and, therefore, amount of Rs. 6000/- awarded for the purpose also appears just and proper and calls for no interference. Compensation awarded for damage to the scooter has not been challenged seriously. Learned tribunal has awarded Rs. 20,000/- for disability of the legend Rs. 30,000/- for future losses and Rs. 15,000/- for bed sore disability. The amount awarded for pain and suffering covers the compensation for sustaining fracture and for the suffering when the claimant was confined to bed and has been treated for bed sore and, therefore, a separate compensation on that heading does not appear to be proper.

11. The next point that arises for determination is as to what would be the just compensation for future loss and shortening of leg. The Tribunal has found that there has been shortening of leg by 1 1/2 and, thereby a permanent partial disability has been created. The claimant is a small shop owner and is also working in the shop of his father. Such a person is required to move and walk almost for the whole day. The shortening of leg shall definitely cause hindrance in the working. Dr. Taneja has assessed the disability to 28%. There has been deformity of the left leg as well. The claimant will have to suffer for whole of the life as he shall be limping and would be facing difficulty in sitting. If this disability is taken into consideration while assessing the disability of whole body, it would come to physical infirmity of 20%. Thus only 1/5 of earning is likely to be effected adversely. Taking the income as Rs. 1000/- p.m., the loss would come to Rs. 200/- p.m. i.e. Rs. 2400/- p.a. The claimant is aged about 30 years and, therefore, a multiplier of 16 will have to be applied. Thus the loss because of permanent partial physical disability including the future loss and general damages would come to Rs. 40,000/-.

Thus the claimant is entitled to a compensation of Rs. 15,000/- Rs. 10,000/- + Rs. 6000/- + Rs. 1300/- + Rs. 40,000/- which comes to Rs. 72,300/-. The claimant would be required to adopt physiotherapy and will be required to take assistance and use calipers or long boots for whole of life. A compensation of Rs. 10,000/- on that count would be a just compensation. Thus the claimant is entitled to a compensation of Rs. 82,300/- which may be rounded to Rs. 83,000/-.

12. Though in this case the appellant Insurance Company has not taken written permission for undertaking the defence for and on behalf of owner and driver of the vehicle and, therefore, they would otherwise be precluded from raising this point at the time of hearing before the Tribunal and before the Appellate Forum as well.

But as in this case learned Tribunal has awarded compensation on the same heading more than once and for this reason it is desirable that same is rationalised by this Court. Though we have held in earlier paras that the Insurance Company is not entitled to raise the point of quantum of compensation even in the Appellate Forum but direction of payment of compensation twice on the same ground/heading would be an error which can always be corrected by superior Court while seized of the matter.

13. The claimant is a third party for the purpose of assessment to payment of compensation. The claimant was neither owner of the goods carried by the truck nor a permitted passenger i.e. labour working in the truck. It appears there was a comprehensive insurance, in such a situation; the Insurance Company would be bound to make payment of whole of the compensation. The claimant would also be entitled for interest at the rate of 12% p.a. 13.

14. As a result, the appeal partly succeed. The amount of compensation is

reduced to Rs. 83,000/- with interest at the rate of 12% p.a. from the date of application till realisation of the same. Parties shall bear their own costs.