

(2009) 11 GAU CK 0006
In the Gauhati High Court

New India Assurance Insurance Co. Ltd.	APPELLANT
Vs	
Lalrammawia and Another	RESPONDENT

Date of Decision : 17-11-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 1, Order 2 Rule 2, Order 3 Rule 1,
Order 3 Rule 2
Motor Vehicles Act, 1988 — Section 163A, 166

Citation : (2010) 2 GLR 335 : (2009) 5 GLT 631

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Judgement

B.D. Agarwal, J.—If the records and judgment passed by the Presiding Officer of the Motor Accident Claims Tribunal, Aizawl, Mizoram in MACT Case No. 81 of 2002 is considered to be an indicator, I have no hesitation to take a view that all is not well in the said office and the claim applications are being disposed of in a perfunctory and slipshod manner and awards are being passed at whims of the Presiding Officer.

2. In the case in hand the Insurance Company is challenging the judgment and award dated 2.9.2004 passed by Sri L. Khobung, learned Member, Motor Accident Claims Tribunal, Aizawl, Mizoram in MACT Case No. 81 of 2002 whereby the Tribunal has awarded a sum of Rs. 10,06,587 with interest at the rate of 9% per annum from the date of filing of the claim petition to the claimant/respondent No. 1, allegedly for sustaining injury in the nature of permanent disablement. Being aggrieved with the quantum of sentence and its liability the insurance company is challenging the impugned award.

3. I have heard Shri Ricky Gurung, learned Counsel for the appellant and Shri S. Sailo, learned Counsel for the claimant/respondent No. 1. The owner of the offending vehicle (respondent No. 2) has not appeared despite being notified. In fact, the owner also did not contest the claim case before the Tribunal. I have perused the impugned judgment, pleadings of both the parties and oral and

documentary evidence proffered on behalf of the claimant in the Tribunal.

4. Facts necessary for deciding this appeal are as follows:

The claimant's case in the Tribunal was that while he was travelling in an auto rickshaw with five others, a truck bearing registration No. MZ-04-0343 dashed the said auto rickshaw causing physical injuries to the passengers of the said auto rickshaw. As could be gathered from the records some of the passengers of the auto rickshaw died and the respondent No. 1 sustained injury on his lower limb and ultimately the lower limb (left) became non-functional due to paralysis. It was also the case of claimant that at the relevant time he was doing the job of carpentry, having monthly income of Rs. 6,200 and due to paralysis of his left limb he could not continue with the aforesaid vocation. On these facts a sum of Rs. 11,97,987 was claimed.

5. In order to establish the fact of accident, income, pecuniary loss to the dependents, etc., the claimant himself did not come to the court to examine himself as a witness. On his behalf a distant relative adduced oral evidence on the basis of power of attorney. In addition to that an Ex-Village Council President was tendered as C.W.2 and" one Police Officer was also examined to prove the police report. To establish the fact of permanent disablement only a medical certificate, issued by Dr. Lalnunthari, M.& H.O. of Champhai Hospital, was filed in the court and the said document has been marked as Ext. C-4. Other documentary evidence includes age certificate of the claimant, GD Entry of the accident, income certificate issued by the VCP, medicine vouchers, discharge certificate from the hospital. Insurance Policy and vehicular documents.

6. The case was contested by the Insurance Company, taking all possible objections, including technical objections regarding maintainability of the case, non-joinder of necessary parties, driving of truck and auto rickshaw without valid driving licences, composite negligence, gravity of injury and the amount of compensation, etc. However, no counter evidence was adduced by the insurance company. Hence, on the basis of the claimant's evidence a sum of Rs. 10,06,587 has been awarded.

7. From the impugned judgment it appears that the Tribunal has accepted monthly income of Rs. 5,200, instead of Rs. 6,200 per month, as pleaded in the claim petition and adopting multiplier of 16 and 100% disability, the aforesaid amount has been calculated.

8. Before advertng to the sustainability to the amount of award, I would like to first deal with the procedural lapses in conducting the enquiry by the Tribunal. Firstly, I would deal with giving of award, virtually on the sole testimony of attorney holder of the claimant. The learned Counsel for the appellant submitted that even it is admitted that claimant had suffered paralysis of one of the lower limbs then also he was physically fit to come to the court and adduce evidence to describe as to how the accident took place, whether it was a case of composite negligence of two vehicles, about his injuries, about his carpentry work and

pecuniary loss as a result of the injuries, etc. However, without assigning any justifiable ground, the claimant stayed away from the dock the Insurance Company was prevented from eliciting relevant informations that could have been possible by cross-examining the claimant himself. For the reasons, best known to the claimant, he did not authorize his wife to give evidence either on his behalf or as a corroborative witness. Under such circumstances, as contended by the learned Counsel for the appellant, the Tribunal ought to have insisted for direct evidence of the victim and should not have passed the award on the basis of secondary nature of oral evidence. The learned Counsel also submitted that even the documentary evidence, more particularly the medical certificate, was also admitted in evidence without insisting for examination of any doctor. The learned Counsel submitted that since the medical certificate was issued by a Government doctor there should not be any difficulty either for the claimant or for the Tribunal itself to summon the doctor.

9. The legal question as to when and under what circumstances and to what extent an attorney can give evidence came for consideration before the hon"ble Supreme Court in the case of Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, . In my considered opinion, it is necessary to extract the relevant provisions of the judgment in this regard, which are as below:

12. ...The power of attorney holder does not have the personal knowledge of the matter of the appellants and, therefore, he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the Principal.

13. Order II, Rules 1 and 2, CPC empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2, CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the Principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

10. During the course of argument, learned Counsel for both sides admitted that in good numbers of cases power of attorney holders are appearing and giving evidence in, the tribunal. Even if I refrain from taking judicial notice of this statement, record of the present case clearly depicts that the Tribunal is in the habit of readily accepting secondary evidence without mincing any word. There is no indication in the impugned judgment as to why the deposition of injured was exempted. As per amended CPC affidavit evidence of witnesses are acceptable. Even there are sufficient provisions in CPC for examination and cross-examination of witnesses by way of appointing Commissioner. However, the

claimant did not avail all these provisions of law. In this way it appears to me that the claimant has evaded giving direct evidence for obscure reasons. In the power of attorney also there is no clarification as to what was the necessity to appoint C.W.1 to give deposition in the court on his behalf and as to why his wife was not authorized to do so. Hence, I hold that the learned Member of the Tribunal has disposed of the case superficially and in a mechanical process and the practice adopted by the Tribunal is highly despicable.

11. The next question relates to non-examination of doctor. In the case of National Insurance Co. Ltd. v. Chandreswar Thakur 2001 (1) GLT 393, a Division Bench of this Court insisted that to establish permanent disability it is incumbent on the part of the claimant to examine the doctor. The legal principle laid down by their lordships is reproduced below:

The whole contention of the appellant is that the learned Tribunal arrived at conclusion that the claimant suffered permanent disability without examining the Doctor. Since the claimant sustained injury, it was incumbent on the part of the claimant to have examined the Doctor and establish its case as to what percentage of permanent disabilities was suffered by the claimant. It would clearly appear that besides submitting a certificate from the Doctor, no doctor who has treated the claimant have been examined by the claimant. Non-examination of the Doctor to establish the extent of disabilities suffered by the claimant deny the opportunity to the Insurance Company to cross-examine the Doctor. In our jurisprudence witnesses put up by either of the parties is subject to cross-examination so as to test veracity or the truthness or correctness of the statement of the witnesses. In the instant case, no Doctor has been examined to establish the extent of disabilities suffered by the claimant and in that view the permanent disability has not been proved. Apart from that the Tribunal saddled the liability with the Insurance Company on the compensation assessed on the basis of permanent disability suffered by the claimant, without giving any opportunity of cross-examining the Doctor.

12. Apart from establishing the percentage of disablement the examination of medical officer is also necessary to ascertain the loss of earning capacity. In the Second Schedule of Section 163A of the Motor Vehicles Act, 1988 it has been laid down that the loss of percentage and disablement of earning capacity shall be determined as per Schedule 1 of the Workmen's Compensation Act, 1923. Since the claim application was filed u/s 163A of the Motor Vehicles Act, 1988 the Tribunal was under an obligation to ascertain the percentage of disability as well as loss of earning capacity after referring to the relevant schedule under the W.C. Act, 1923. However, the Tribunal not only ignored the statutory provisions of law but has also defied the law laid down by this Court in the case of Chandreswar Thakur (supra).

13. Coming to the facts at hand, the Medical Certificate (Ext.C-4) appears to have been issued by a doctor on a plain paper, without disclosing his MCI Registration No. Even otherwise in the said certificate the doctor has not certified

about the paralysis of left lower limb or that it amounts to 100% permanent disability. Strangely, instead of confining himself to mention the nature of injury and percentage of disability the doctor has certified that the "claimant will not be able to continue his carpentry work any further". In my considered opinion, carpentry work is ordinarily done by hands and not by legs. Besides this, the evidence on record shows that the claimant was having a carpentry shop at home. Hence, the claimant must be in a position to continue his carpentry work, albeit, with the assistance of helpers. In this way, the medical certificate appears to have been procured only to get inflated compensation and the learned Member, MACT, Aizawl readily declared that the claimant had suffered 100% disability. It may also be mentioned here that the claimant was discharged from the hospital after 16 days of treatment and in the discharge certificate (Ext.C-8) also there is no mention of paralysis of the left limb. Even assuming, without any evidence, that the claimant had suffered from paralysis of left limb it cannot be a case of 100% disablement. Schedule 1 of the W.C. Act also does not recognise paralysis of one limb as permanent total disablement. As such, awarding of compensation of Rs. 10,06,587 on the basis of 100% disability is totally unjustified and cannot sustain from any angle.

14. Other pertinent questions relate to non-proof of driving licence of the driver of the offending vehicle, non-impleadment of drivers of both the vehicles and non-framing of any issue of composite negligence. From the police report it was apparently a case of head-on-collision. Despite this fact the owner of the auto rickshaw in which the claimant was travelling was not impleaded as a party nor has any finding been rendered that it was not a case of head-on-collision. Ordinarily when the accident takes place in the nature of head-to-head it is presumed that drivers of both the vehicles must have been at fault for accident. The percentage of negligence depends on case to case basis. In the case before me, no issue at all in this regard was framed. Besides this, the police officer himself admitted that when he arrived at the scene the driver of the truck had already fled away and, as such, his licence could not be seized. In the cross-examination the I.O. has also admitted that the driver of the auto rickshaw was possessing only learners driving licence. For the best reason known to the Tribunal, neither the drivers had been impleaded in the case nor did the owner of both the vehicles produce their respective drivers to prove that the vehicles were being driven by competent drivers, having valid licences. Without proof of this fact fastening the liability upon the Insurance Company to pay the entire compensation is also illegal.

15. In the case of *Oriental Insurance Co. Ltd. v. Kitbokson War* 2009 (1) GLT 143; this Court held that if the owner of the offending vehicle does not give any evidence to prove the fact of having a valid driving licence by its driver an inference should be drawn that at the relevant point of time the vehicle was being driven by an un-licensed driver.

16. The above apart, in the case of *The Oriental Insurance Company Limited Vs.*

Meena Variyal and Others, ; the hdn''ble Supreme Court has deprecated the practice of deciding claim applications in perfunctory manner. In this case, their lordships have held that not only impleadment of driver is a legal requirement but it is the primary liability of the driver to pay compensation and the said liability subsequently shifts upon owner and Insurance Company. This legal principle has been laid down in the following words:

10. Before we proceed to consider the main aspect arising for decision in this appeal, we would like to make certain general observations. It may be true that the Motor Vehicles Act, insofar as it relates to claims for compensation arising out of accident, is a beneficent piece of legislation. It may also be true that subject to the rules made in the behalf, the Tribunal may follow a summary procedure in dealing with a claim. That does not mean that a Tribunal approached with a claim for compensation under the Act should ignore all basic principles of law in determining the claims for compensation. Ordinarily, a contract of insurance is a contract of indemnity. When a car belonging to an owner is insured with the insurance company and it is being driven by a driver employed by the insured, when it meets with an accident, the primary liability under law for payment if compensation is that of the driver. Once the driver is liable, the owner of the vehicle becomes vicariously liable for payment of compensation. It is this vicarious liability of the owner that is indemnified by the insurance company. A third party for whose benefit the insurance is taken, is, therefore, entitled to show, when he moves u/s 166 of the Motor Vehicles Act, that the driver was negligent in driving the vehicle resulting in the accident; that the owner was vicariously liable and that the insurance company was bound to indemnify the owner and consequently, satisfy the award made. Therefore, under genera] principles, one would expect the driver to be impleaded before an adjudication is claimed u/s 166 of the Act as to whether a claimant before the Tribunal is entitled to compensation for an accident that has occurred due to alleged negligence of the driver. Why should not a Tribunal insist on the driver of the vehicle being impleaded when a claim is being filed?

17. In view of the aforesaid defects in the proceeding and also on account of failure to prove that vehicles were being driven with valid licences the impugned judgment and award is declared as perverse and unsustainable in law.

18. Although this case is destined for remand, I could not resist my temptation to examine the justification of awarding more than Rs. 10 lakhs in this case. In the recent judgment of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, ; the hon''ble Supreme Court has insisted upon maintaining uniformity and consistency in awarding compensation. Their lordships have observed that compensation should be fair and equitable and it should make good the loss suffered by the victim and it should not be a pittance, but at the same time, it should not result into a windfall or avaricious bonanza nor a source of profit for the claimant. The trend setting observations of the Apex Court deserve to be reproduced and it is this:

16. Compensation awarded does not become "just compensation" merely because the Tribunal considers it to be just. For example, if on the same or similar facts (say the deceased aged 40 years having annual income of Rs. 45,000 leaving his surviving wife and child), one Tribunal awards Rs. 10,00,000 another awards Rs. 5,00,000, and yet another awards Rs. 1,00,000, all believing that the amount is just, it cannot be said that what is awarded in the first case and the last case is just compensation "Just compensation" is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit.

17. Assessment of compensation though involving certain hypothetical considerations, should nevertheless be objective. Justice and justness emanate from equality in treatment, consistency and thoroughness in adjudication, and fairness and uniformity in the decision-making process and the decisions. While it may not be possible to have mathematical precision or identical awards in assessing compensation, same or similar facts should lead to awards in the same range. When the factors/inputs are the same, and the formula/legal principles are the same, consistency and uniformity, and not divergence and freakiness, should be the result of adjudication to arrive at just compensation....

19. Earlier to that also similar advice was given the Apex Court in the case of K.S.R.T.C. v. Mahadeva Shetty AIR 2003 SCW 3737; which is as below:

Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guess and arbitrariness.

20. Turning to the facts and circumstances of the case at hand, I have already mentioned earlier that the compensation was computed taking into consideration 100% disability, although it was not so. Besides this, the income @ of Rs. 5,200 per month has been accepted taking into consideration the evidence of Ex-President of Village Council. In the case of New India Assurance Co. Ltd. Vs. Kallian Thanga and Another, ; this Court held that the income certificate issued by such VCP cannot be considered as proof of income. In the case of General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, the hon'ble Supreme Court had advised that the tribunal should cross check the amount of compensation, being awarded, to ascertain as to whether annual interest of the amount would take care of the pecuniary loss. In the present case the tribunal could have easily cross-checked the amount of compensation with the formula prescribed in the W.C. Act, but no such exercise was done.

21. As could be gathered from the evidence on record the claimant was less than 40 years of age at the time of accident. His monthly income has been accepted by the tribunal being Rs. 5,200. In the eventuality of death of a person of this age and having equal amount of income, the dependency could have been taken at Rs. 3,500 p.m., i.e., Rs. 42,000 per annum, after deducting 1/3rd for personal expenses of the deceased. By adopting multiplier of 15 [as per the judgment of Sarla Verma (supra)] the pecuniary loss to the dependents of the deceased would have been assessed at Rs. 6,30,000. With the addition of general damages the award at best could have gone upto Rs. 6.5 lakhs. However in the present case where there was hardly 50% disablement and the injured being capable of running the same business a whooping amount of more than 10 lakhs has been awarded. I feel, under no circumstances such an exaggerated amount can be granted in the given facts. To say it differently, the impugned award has been passed without application of judicial mind.

22. As has been advised by the hon'ble Supreme Court in the case of Sarala Verma (supra) there should be uniformity and consistency in determining the compensation. On the very next day of the hearing of this appeal, I had the occasion to hear another appeal, being MAC Appeal No. 19 of 2009, arising out of MACT Case No. 99/06 from the same tribunal. The record of the said case shows that the injured was a young lady of 20 years and was having good income from hotel business, was knocked down by a truck, while standing on the road. As a result the girl sustained fracture on her pelvic bone and the doctor, who had examined her, deposed in the case that the injured/victim girl would not be able to have a normal married life and she may not be able to bear children also. Despite such grievous injury, declared to be 40% permanent disability, sustained by an young girl the Tribunal awarded a sum of Rs. 2,51,176.00. The awards of the aforesaid two cases reflect that the learned Presiding Officer of the Tribunal is not maintaining uniformity in awarding compensation. Besides this, in the aforesaid MACT Case No. 99/06 the claimant had produced permanent partial disability certificate issued by a Medical Board. Hence, it appears to me that there is a practice of issuing disability certificates by a Board of doctors. Unfortunately, while deciding the case under consideration, the tribunal did not insist for any such certificate from the Board. The above apart, in MACT case No. 99/06, the claimant had also filed a copy of Gazette Notification dated 20.7.2007, issued by the Government of Mizoram, fixing minimum wages of workers. As per the said Notification the carpenters have been placed as skilled grade-II workers and their daily wage has been fixed at Rs. 143. As per this rate also the monthly income of a carpenter comes to around Rs. 3,700 per month and that too after 2007. However, in the case before me the accident took place in the year 2002 and despite that the income of the claimant has been taken at Rs. 5,200 p.m. without any legal and admissible Evidence. In this way, the compensation appears to have been awarded without maintaining any uniformity.

23. Before parting with the judgment, I would also like to put on record that the impugned judgment has been passed on the basis of photocopy of deposition of

the police officer. The deposition appears to have been recorded in case No. 63 of 2002 and a copy of the same has been placed in the record of MACT Case No. 81/2002. There is no corresponding order in the record as to how the testimony of the police officer, given in another case, was tendered in the present case. Shockingly, the Presiding Officer of the Tribunal also did not put his signature below the deposition of the witness with the certificate that deposition was read over to him. There is also no indication that the witness was allowed to be cross-examined by the Insurance Company in MACT Case No. 81/2002. Besides this, it is also not evident from the photocopy of the testimony as to when the deposition of the police officer was recorded. I do not deem it necessary to burden this judgment by discussing other procedural lapses.

24. For the reasons, alluded hereinabove, I hold that the appeal has sufficient merit. Consequently, the appeal stands allowed. The impugned judgment and award is hereby set aside. The learned Member-cum-Presiding Officer, MACT, Aizawl is directed to decide the case afresh. While doing so, the Tribunal shall also implead owners and drivers of both the vehicles and give opportunity to all the contesting parties to adduce fresh or additional evidence, as the case may be. If the parties choose not to summon the doctor, the Tribunal shall suo motu obtain medical opinion to ascertain the percentage of disability and loss of earning capacity of the claimant. After hearing the case afresh, a new award should be passed. If it is found that excess amount had been awarded earlier and disbursed to the claimant, the same shall be recovered.

25. Return the records to the Tribunal with a copy of this judgment.

26. The parties are directed to appear in the Tribunal on or before 7.12.2009 and receive further orders.

27. Registry is further directed to forward a copy of this judgment to the hon''ble Portfolio Judge of Mizoram for information.