

(2003) 12 GAU CK 0049

In the Gauhati High Court

Case No : Writ Petition (C) No. 132, 133, 134, 135 and 136 of 2003

New India Insurance Co. Ltd.

APPELLANT

Vs

Lalhlmingthangi and Another

RESPONDENT

Date of Decision : 11-12-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Motor Vehicles Act, 1988 — Section 140, 142, 149, 158

Citation : (2004) 2 GLR 567

Hon'ble Judges : S.K. Kar, J

Bench : Single Bench

Advocate : George Raju and Ricky Gurung, for the Appellant; M.M. Ali, for the Respondent

Judgement

S.K. Kar, J.—These five petitions W.P (C) Nos. 132 to 136 of 2003 under Article 226/227 of the Constitution of India were presented by the same petitioner, i.e., The New India Assurance Co. Ltd., Aizawl Branch, Aizawl with intend to challenge legality of the "awards" (orders) passed by learned Member, MACT, Aizawl in MACT Cases No. 43/44/45/46 and 47 of 2003 on 6th June, 2003.

2. In view of the fact that all petitions were presented by the same insurer against different claimants along with the common owner of the vehicle which was involved in the accident, they were taken together for disposal by this common judgment and order.

3. The accident in question took place on 6.12.2002 near Bualpui North at about 1.00 a.m. involving a Mahindra Pick-up vehicle bearing registration No. MZ-01-B-7567. The said vehicle was owned by Shri Lalmalsawema of Thuampui, Aizawl (respondent No. 2 herein) and driven by one Malsawemtluanga having driving licence No. 13260/ MZ/Proff dated 4.11.2001. The owner of the vehicle was impleaded in the claim cases before the Claims Tribunal (Motor Accident Claims Tribunal, Aizawl) as Opposite Party No. 1 and the present petitioner as Opposite Party No. 2. The present petitioner presented his written statements/objections

challenging maintainability of the claims against the insurer (itself) and also filed petition before the learned Claims Tribunal u/s 170 of the Motor Vehicle Act, 1988 (hereinafter to be referred "the Act") which are pending decision of the learned Claims Tribunal. But learned Claims Tribunal has passed interim "awards" (orders) directing payment of Rs. 25,000 in favour of claimants in each of the cases rejecting objection of the petitioner causing serious prejudice to the petitioner and hence all these petitions. The question whether these are to be treated as writ petitions or revision petitions vide counter filed will be taken up at appropriate space.

4. The petitioner submits that the order of the Claims Tribunal is arbitrary and not sustainable in law. Particularly when all the "awards" (orders) were passed in a stereotyped way in cyclo-styled form without applying judicial mind. That the alleged 25% to 45% of disability found by the doctor is not the "permanent disability" as conceived by Section 142 of the Act and accordingly the provision of Section 140 of the Act was not attracted in the particular facts and circumstances of the case and the view aforesaid has got its support from the law given in The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc.,

5. That the vehicle involved in the accident was under the NEEPCO department at the relevant time and it was a private vehicle and policy was not covering risk of gratuitous passenger for which also the Insurance Company had no liability, etc.

6. The present writ petitions are being contested only by respondent No. 2 (owner of the vehicle) by presenting affidavits-in-opposition. The contesting respondent submitted that the vehicle in question had comprehensive policy of insurance covering the Third Party Risk and there is not right in favour of the petitioner-insurance company to challenge the order of "interim award" by filing writ petition. That the "interim award" was granted u/s 140 of the Act under the principle of "no fault liability" and as per provision of law the "interim award" was not award u/s 168 of the Act and no defence is available to the insurance company against such award particularly in view of the provision u/s 149(2) of the Act.

7. I have heard both sides and considered the materials placed before the Court. Learned counsel for the petitioner has cited law given in the case of National Insurance Co. Ltd. v. Jethu Ram and Ors. reported as 1987 (2) TAC 805 wherein it is stated that if it is ultimately found that under the policy insurance, the insurer is not liable to pay compensation, the liability which accrues under the provisions of Section 92A (now Section 140) shall not be borne by the Insurer. Allowing the appeal of the insurance company Hon"ble court held exactly as follows (concluding) :

"2. The insurer having paid the amount under the aforesaid provisions is entitled to get it reimbursed from the owner."

On careful examination of the law it will be seen that it was opined in a different

aspects of the matter. The compensation on "no fault" count was initially satisfied by the insurer and as and when ultimately it was found that under the policy the insurer was not liable the court held that insurer "is entitled to get it reimbursed". View of the Claims Tribunal in that case was that amount to be paid u/s 92A of the Act of 1939 has to be borne by the insurer and the owner will not be liable to pay the said amount, which finding was affirmed by the High Court, and Hon"ble Apex Court set aside the same view by accepting the contention of the learned counsel for the appellant that under provisions of Sections 92A and 92B of the old Act of 1939 there is no liability on the insurer to pay the compensation accruing under the aforesaid provision, once it is ultimately held that under the policy of insurance the insurer has no liability to pay the compensation in question. Therefore, this law cited by the learned counsel for the petitioner does not come to protect the petitioner from making initial payments of compensation under the provision of Section 140 of the Act. The contrary view has been given by a Full Bench decision of this Court in United India Insurance Co. v. Smt. Suhagini Paul and Anr. 1997 (1) GLT 352 where it was held as follows :

"The Insurance company is debarred to raise any plea of its liability at the stage of consideration of the matter of no fault liability u/s 140 of the Motor Vehicle Act, 1988."

Similar view was taken in catena of cases decided by the Hon"ble Apex Court and different High Courts and one of them is reported as United India Insurance Company Ltd. Vs. Lehu and Others, where it was held (vide para 18) as follows :

"Now let us consider Section 149(2). Reliance has been on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held in Skandia and Sohan Lal Passi cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic "NO". To hold otherwise would be to negate the very purpose of compulsory insurance. The insured or relatives of the person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the Legislature, in its wisdom, has made insurance, at least third-party insurance, compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is insurance. In all businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus, it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or lose. These provisions meet these requirements. We are thus in agreement with that is laid down in the

aforementioned cases viz., that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The insurance company must establish that the breach was on the part of the insured."

8. Even in case of fake driving licence the insurance company is to pay first to innocent Third party but it may recover same from the insured later. In New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., also Hon"ble Apex Court held in case of no fault claim that it is insurance company which is initially liable to pay such compensation in favour of third party subject to its right to recover it from the owner. This court in this context while dealing with a case of appeal against no fault held earlier that compensation paid under no fault count is not an "award" as conceived by Sections 168 and 173 of the Act, refer 2003 (1) GLR 286 ; State of Tripura v. Jhama Paul and Ors., while doing so learned Single Judge of this court differed respectfully with the views expressed in Oriental Insurance Company Limited, New Delhi Vs. Chitaman and Others,

9. Coming to the scheme of law given by the Act it will be seen that Chapter X (Sections 143 to 144) of the Act deals exclusively with the question of "liability without fault in certain cases" and Section 144 has the overriding effect upon the provisions of the whole Act which goes as follows :

"144. Overriding effect. - The provisions of this Chapter shall have effect notwithstanding anything contained in any other provision of this Act or of any other law for the time being in force."

This provisions are exhaustive and self-contained in so far "liability to pay compensation in certain cases on principles of no fault" is concerned. It requires no elucidation that compensation in vehicular accident cases are assessed both on count "no fault" as well as on count of fault". There is separate provision in the act to award compensation on fault count of the offending vehicle contained in chapter XII (Section 165 to 176). Explanation appended to Section 165 coming under Chapter XII goes as follows :

"165. Claims Tribunal. - (1)

Explanation : For the removal of doubts, it is hereby declared that the expression "claims for compensation in respect of accident involving the death of or bodily injury to persons arising out of the use of motor vehicles" includes claims/or u/s 140 and Section 163A."

Therefore, any compensation granted on "adjudicating upon the claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of third party, includes adjudication both on count of "no fault". So claim for compensation on no fault count is also a compensation being part of the award granted u/s 168 of the Act but it is not termed as an "award" against which an appeal lies as per provision of Section 173 of the Act to be preferred by "any

person aggrieved by an award of the Claims Tribunal."

In this context it may be noted that Section 170 of the Act makes provision for insurer of the vehicle to be impleaded in claim cases and on certain conditions, as enumerated in Clauses (a) & (b) of the said section, the insurer has "the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made ; Law is, therefore, well-settled that the insurers of the vehicle do not have any right to prefer the appeal unless Section 170 of the Act is satisfied, refer, Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, also in (2000) SCC 113 and National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, It was also held in Sadhana Lodh Vs. National Insurance Company Ltd. and Another, ;Sadhana Lodh v. New India Assurance Co. Ltd. and others while dealing with petition by insurance company under Article 226/227 of the Constitution by the Hon"ble Apex Court that grounds of challenge in appeal cannot be enlarged by filing a writ petition, following an earlier decision of that court, i.e., National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, It will be worth noting here the view expressed by the Hon"ble Apex Court, while dealing with a similar situation, in para 21, 22, 23 of judgment given in New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., The relevant excerpts are quoted as here under :

"21. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22. To repeat, the effect of the above provisions is this : when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23. It is advantageous to refer to a two-Judge Bench of this court in Skandia Insurance Co. Ltd. Vs. Kokilaben Chandradan and Others, Though the said decision related to the corresponding provision of the predecessor Act (M.V. Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judges pointed out that the insistence of the Legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the Insurance Company but to protect the members of the community who become sufferers on account of accidents arising from use of motor vehicles. It is pointed out in the decision that such protection would have remained only a paper protection if the compensation

awarded by the Courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the *raison d'être* for the Legislature making it prohibitory for motor vehicles being used in public places without covering third party risks by a policy of insurance."

Therefore, the law is very clear as to that was intended by the Legislature while enacting law under Chapter X of the Act and it is this that the victim of vehicular accident in case of suffering permanent disablement as well as dependants (legal representatives) of the person who died should be given immediate financial relief and what is "permanent disablement" has been defined in Section 142 of the Act which goes as follows:

"142. Permanent disablement. - For the purpose of this chapter, permanent disablement of a person shall be deemed to have resulted from an accident of the nature referred in Sub-section (1) of Section 140 if such person has suffered by reason of the accident, any injury or injuries involving :

- (a) Permanent privation of the sight of either ear, or privation of any member or joint ; or
- (b) Destruction or permanent impairing of the powers of any member or joint ; or
- (c) Permanent disfiguration of the head or face."

In case of "permanent disablement" due to sustaining of an injury Sub-clause (2) of Section 140 provides as follows : "140. Liability to pay compensation in certain cases on the principle of no fault

(1)

(2) The amount of compensation which shall be payable under Sub-section (1) in respect of the death of any person shall be a fixed sum of (fifty thousand rupees) and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of (twenty-five thousand rupees)."

Therefore, it is obligatory on the part of the Claims Tribunal to come to such a decision before allowing the prayer for compensation on "no fault" count, or otherwise, to ascertain the following facts :

- (a) Whether there was an accident on the date, at the time and place as alleged.
- (b) Whether the vehicle mentioned in the claim petition was involved in the accident.
- (c) Whether the offending vehicle had insurance cover on the date of accident.
- (d) And in case of claim of permanent disablement whether there is either certificate from the doctor or competent authority to find and hold that there was any case of permanent disablement as defined u/s 142 of the Act.

Only on a positive finding on these question the Claims Tribunal has a liberty to fix up the liability on the owner and, in case of the insurance cover being valid he is to be indemnified by the insurance company (insurer) and the Claims Tribunal may thereafter order the recovery of the sum immediately from the insurance company.

12. Without that being done any stereotyped or mechanical order directing the payment of no fault compensation, in my opinion, is neither desired by the legislators nor warranted for ends of justice. No doubt it is a welfare legislation but fact remains no one, whatever may be his status in the society, should be denied justice by the Court/Claims Tribunal, if he himself is not responsible for any omission/commission or laches. It may be further impressed that insurance company can be saddled with the liability u/s 140 as insurer, keeping also in view the provisions of Section 149, only if either the insurance company admits the fact that the offending vehicle had been insured with it, or such a fact is prima facie established from the materials on record. It may be highlighted here that codification of Section 140 resulted pursuant to long felt aspiration of the claimants and wishes of the Judiciary. To summarise, it is the duty of the Claims Tribunal even to act suo motu, in the right spirit of Section 158 Clauses (6) of the Act, to give relief provided u/s 140 which is a constitutional duty of the Claims Tribunal and the Court but not without due adherence to the law and procedure.

13. Adverting to the particular facts of the cases here, I find that in these cases there are the allegations of the different claimants that there were respective disablements varying to the extent of 25% to 45% and in one case there is even no disablement but simply a mention of "NA" (may be meaning "Not assessed" or "Not applied"). Learned Claims Tribunal had directed a payment of Rs. 25,000 in this case, i.e., W.P.(C) No. 133/03, also (MACT Case No. 44/03). This is definitely a perverse findings vis-a-vis provisions of Section 142 of the Act. Section 140 of the Act has never contemplated such hasty and unconscionable action.

14. At the risk of repetition the payment of Rs. 25,000 as compensation on no fault count may be directed only on a positive and clear finding in writing that injury sustained by the victim amounted to a case of "permanent disablement" as denied u/s 142 of the Act, and not otherwise. Law will get reduced to a farce if in each and every case there is an initial payment of no fault of Rs. 25,000 (in addition of a case of travesty of justice and the ignorance of the provision of the law). We cannot presume such a loophole in the factual proposition that as and when an accident happens and somebody is injured. Claims Tribunal on approach would be giving mechanically an immediate pecuniary relief of Rs. 25,000 when ultimately on adjudication he may not be entitled to any compensation or even a compensation much less than Rs. 25,000.

15. In this context and under the facts as stated, it has been rightly submitted by the learned counsel for the petitioner that the Claims Tribunal was acting mechanically, arbitrarily and without application of judicial mind. In view of the

fact that the learned Claims Tribunal was in the habit of passing a stereotyped orders in the cyclostyled Form, I find the submission has substance.

16. Be that as it may, as discussed beforehand, the law as pronounced by Hon"ble Apex Court and other High Courts including this Court in this regard do not give any exhaustive but only limited statutory right to the insurer either to file an appeal as contemplated by Section 173 of the Act without complying Section 170 of the Act or to file a writ petition under Article 226/227 of the Constitution, in alternative, against "award" of the Claims Tribunal, the present writ petitions cannot be entertained in this form and are required to be converted to revision petitions. On the principle that the Claims Tribunal is being treated as Civil Court, if not person designata as opined by some authorities , the revision u/ s 115 of the CPC will definitely lie to High Court against any order passed by it including order u/s 140 of the Act. Therefore, all these petitions are to be treated as revision petitions. Office will amend/correct the relevant cause-titles of petitions/cases accordingly.

17. Incidentally, it may be noted here that Section 4 of the Workmen"s Compensation Act, 1923 also speaks on the term of "permanent total disablement", "permanent partial disablement" and "temporary disablement" etc. and the method of ascertaining the percentage of such disablement"s has been given in Schedule 1 of that Act for which reason also one can necessarily come to the conclusion that there is no scope of going for a hasty conclusion on the question of disablement and permanent disablement, etc., as the case may be. It may be noted that percentage of disablement is provided only under the Workmen"s Compensation Act without there being any similar provision in the M.V. Act (the Act).

18. In the results, and on the reasons discussed beforehand, the revision petitions are allowed and the impugned orders passed by the Claims Tribunal in each of the cases, i.e., MACT Cases No. 43/44/45/46 and 47 of 2003 on 6.6.2003 are set aside. The cases are send back to Claims Tribunal for consideration of the matter afresh and for passing appropriate orders after given the parties concerned opportunities of being heard without unnecessary delay, etc.