

(2011) 03 SHI CK 0117
In the High Court Of Himachal Pradesh
Case No : CMPMO No. 227 of 2009

Oriental Insurance Company

APPELLANT

Vs

Sh. Parveen and Others

RESPONDENT

Date of Decision : 09-03-2011

Acts Referred:

Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 62, 63, 74, 76, 77
Motor Vehicles Act, 1988 — Section 166, 170

Citation : (2011) 6 RCR(Civil) 336

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Judgement

Deepak Gupta, J.—This petition is directed against the award dated 4.9.2008 passed by learned Motor Accident Claims Tribunal (II), Shimla whereby he awarded compensation of Rs. 4,90,000/- alongwith interest @ 8% p.a. to the claimant and held the Petitioner Oriental Insurance Company liable to satisfy the award.

2. This Court in proceedings under Article 227 of the Constitution of India, normally, would not interfere with an award passed by a learned Motor Accident Claims Tribunal if the Tribunal has exercised its jurisdiction in accordance with law. In this case, there are two glaring errors in the proceedings which virtually force me to interfere in the award.

3. The first error is that the Insurance Company had moved an application u/s 170 of the Motor Vehicles Act seeking permission to contest the claim on all grounds. Such application was filed on 27.6.2008 and a specific allegation was made that the reply filed by Respondent No. 1 clearly showed that there is collusion between the claimant and Respondent No. 1. In its order dated 27.6.2008 the learned Tribunal noticed the factum of the application having been filed and also directed that the reply be filed by 4.8.2008. On 4.8.2008 the Respondents were given further time to file reply to this application by

23.8.2008. Thereafter, no orders were passed on this application.

4. An Insurance Company is not permitted to contest the claim on any ground other than those which are its statutory defences unless it has obtained permission of the Motor Accident Claims Tribunal u/s 170 of the Act to contest the claim on all grounds. Therefore, the Insurance Company cannot contest the petition on the issues of negligence and quantum nor can it file an appeal on these grounds unless it has obtained permission envisaged u/s 170 of the Act. It is thus clear that Section 170 of the Case gives a very valuable right to the Insurance Company. Though, an application was filed, the Tribunal did not care to decide this application, and this has caused grave injustice to the Insurance Company calling for interference in these proceedings.

5. The second error is that the learned Tribunal while assessing the compensation has relied upon the disability certificate Ext. P.W.-1/A which has not been proved in accordance with law. This disability certificate was issued by a Disability Board. The case was fixed for evidence of the claimant on a number of occasions and finally on 7.5.2008. Though steps were taken for this date but it was found that addresses of the witnesses were incorrect. Therefore, the claimant was directed to produce his evidence on self responsibility on 27.6.2008. In the meantime, Sh. Tek Chand Sharma, learned Counsel for the claimant filed an application and prayed that earlier name of Dr. Ramesh Chand was mentioned in the list of witnesses and dasti summons taken for his service but it had now been found that he stands transferred to Hamirpur and in his place Dr. Mokta who was the other member of the disability board may be permitted to be examined. This application was allowed and Dr. Mokta was ordered to be examined. When Dr. Mokta appeared in the witness box he clearly admitted that he was neither the member of the disability board nor had he ever examined the claimant. It is thus obvious that the claimant had not approached the Tribunal with clean hands while getting fresh summons issued for summoning Dr. Mokta. No doubt Dr. Mokta has identified the signatures of the members of the disability board but he has clearly stated that since he has not examined the claimant he cannot say anything with regard to the disability. The learned Tribunal relying upon this disability certificate assessed the loss of earning capacity of the claimant at 50% and calculated the compensation.

6. I am constrained to observe that the learned Tribunal totally loss sight of various judgments rendered by this Court and by the Apex Court. In National Insurance Co. v. Nant Ram and Ors. Latest HLJ 2005 (HP) 153 this Court held as follows:

15. It is a cardinal, basic and established principle of evidence law that documents, other than public documents are tendered in evidence through witnesses who, after taking oath prove the documents appropriately as well as the contents of the documents, by way of leading direct evidence. Actually documents are produced and proved through witnesses and their contents also established and proved either by way of primary evidence or secondary evidence

but in any event the established and accepted mode of proving documents is by production of witnesses in the Court who testify about the correctness, genuineness and authenticity of the documents as well as their contents, mostly through the medium of proving them as and by way of, primary evidence and in certain given situations through the medium of secondary evidence. The purpose of course is two fold; firstly that such a witness appearing in the Court is sworn and under oath testified about a particular document, its genuineness and authenticity as well as its correctness and secondly once under oath and examination this witness is subject to cross-examination by the opposite party so that the opposite party through the mechanism of cross-examination of such a witness can elicit appropriate information concerning the document itself with respect to its veracity, truthfulness background, correctness etc. etc. Enough indication of such requirement of law is found in Section 62 of the Evidence Act which refers to the documents as primary evidence and clearly suggests that such documents can be produced for the inspection of the Court meaning thereby that through witnesses alone the documents have to be brought on record of the Courts. Similarly u/s 63 of the Evidence Act, secondary evidence has been defined and reading together these two Sections, it can be safely said that documents, either by way of primary evidence or by way of secondary evidence or otherwise have to be appropriately and properly proved by their production in the Courts through witnesses alone.

16. There is only one exception to the aforesaid rule of evidence law with respect to proof of documents and that exception relates only to the proof of public documents by production of certified copies of such documents, Section 74 of Indian Evidence Act defines public documents which include documents forming the acts or records of the acts of the sovereign Authority and of the official bodies and Tribunals and also include documents from Public Officers, Legislative, Judicial as well as Executive. u/s 76 of the Evidence Act every Public Officer having the custody of a public document, which any person has a right to inspect, has duty to give to such a person on demand a certified copy of such document. u/s 77 of the Evidence Act, the certified copies of Public documents issued in the manner prescribed by Section 76 may be produced in proof of the contents of the public documents. The practice of allowing such documents to be brought on record by their mere production by a counsel and then even marking them as Exhibits is very very unhealthy, very dangerous and the same is totally opposed to all principles of Evidence law.

17. Even though undoubtedly, proceedings u/s 166 of the Motor Vehicles Act, 1988 may be summary in nature and the strict procedural laws may not be attracted in such proceedings, yet in so far as the requirement of the proof of disputed documents is concerned, the Tribunals should be well advised to keep in mind that the established norms emanating from the principles of Evidence law must be followed even in such proceedings with a law must be followed even in such proceedings with a view to ensuring that the documents of suspicious or doubtful character or documents which are liable to be disputed character or

documents which are liable to be disputed by the opposite party must not be allowed to be brought on record unless they are proved in accordance with the well established and well accepted norms and principles of Evidence law.

7. A disability certificate is not a public document and therefore must be proved in accordance with law. In fact, it is only the Doctor who issues the certificate or has examined the claimant who can certify what is the disability suffered by the claimant. It is only the doctor who on examination can clearly state as to what work the claimant can do and what he cannot do.

8. The apex Court in *United India Insurance Co. Ltd. Vs. Anubai Gopichand Thakare and Others*, in relation to a similar certificate held as follows:

9. The certificate in question in this case was obtained after two years. It is not known as to whether the civil surgeon of the hospital treated the Appellant. On what basis, such a certificate was issued two years after the accident took place is not known. The author of the said certificate had not been examined. Unless the author of the certificate examined himself, it was not admissible in evidence.

9. The apex Court in *Raj Kumar Vs. Ajay Kumar and Another*, in a very erudite judgment, has dealt with principles of assessment of damages in injury cases. Dealing with disability certificates the Apex Court held as follows:

12. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give "ready to use" disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability.

10. Thus, it is obvious that mere production of a disability certificate is no proof of the extent of disability till the Doctor who issued the certificate or treated the patient is tendered for cross examination in Court. The Apex Court also held that the same injury can lead to different loss of earning capacity and summarized the principles in the following terms:

13. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

11. It would also be pertinent to notice that the Apex Court noticed the difficulties in examining the Doctors and has given certain suggestions in this behalf and it would be pertinent to reproduce the same:

16. We may in this context refer to the difficulties faced by claimants in securing the presence of busy Surgeons or treating Doctors who treated them, for giving evidence. Most of them are reluctant to appear before the Tribunals for obvious reasons either because their entire day is likely to be wasted in attending the Tribunal to give evidence in a single case or because they are not shown any priority in recording evidence or because the claim petition is filed at a place far away from the place where the treatment was given. Many a time, the claimants are reluctant to take coercive steps for summoning the Doctors who treated them, out of respect and gratitude towards them or for fear that if forced to come against their wishes, they may give evidence which may not be very favorable. This forces the injured claimants to approach "professional" certificate givers whose evidence most of the time is found to be not satisfactory. Tribunals should realize that a busy Surgeon may be able to save ten lives or perform twenty surgeries in the time he spends to attend the Tribunal to give evidence in one accident case. Many busy Surgeons refuse to treat medico-legal cases out of apprehension that their practice and their current patients will suffer, if they have to spend their days in Tribunals giving evidence about past patients. The solution does not lie in coercing the Doctors to attend the Tribunal to give evidence. The solution lies in recognizing the valuable time of Doctors and accommodating them. Firstly, efforts should be made to record the evidence of the treating Doctors on commission, after ascertaining their convenient timings. Secondly, if the Doctors attend the Tribunal for giving evidence, their evidence may be recorded without delay, ensuring that they are not required to wait. Thirdly, the

Doctors may be given specific time for attending the Tribunal for giving evidence instead of requiring them to come at 10.30 A.M. or 11.00 A.M. and wait in the Court Hall. Fourthly, in cases where the certificates are not contested by the Respondents, they may be marked by consent, thereby dispensing with the oral evidence. These small measures as also any other suitable steps taken to ensure the availability of expert evidence, will ensure assessment of just compensation and will go a long way in demonstrating that Courts/Tribunals show concern for litigants and witnesses.

12. In view of the above law laid down by the Apex Court, it is clear that the assessment made by the learned Motor Accident Claims Tribunal is totally against the law laid down by the Apex Court and therefore, the award cannot be sustained.

13. Consequently, the award is set-aside and the matter is remanded to the learned Tribunal. The learned Tribunal shall decide the application filed by the Insurance Company u/s 170 of the Act at the first instance. Thereafter, it shall give only one opportunity to the claimant to produce the Doctor since in this case the claimant had already taken a number of opportunities and had also taken dasti summons to produce the doctor. No application for examination of the doctor on commission shall be entertained and it shall be the responsibility of the claimant to serve and produce the doctor who issued the disability certificate. Only one opportunity in this behalf shall be given and in case the claimant fails to produce the doctor, the evidence of the claimant shall be closed. In case the doctor is examined, an opportunity to rebut the evidence shall be given to the Respondents and to the Insurance Company if it is permitted to contest the claim on all grounds.

14. At present there is no office functioning as MACT-II, Shimla. Therefore, the parties are directed to appear before the MACT, Shimla on 18.4.2011 who shall then proceed with the matter.

15. The petition is disposed of in the aforesaid terms. No costs. A copy of this judgment be circulated to all the Motor Accident Claim Tribunals in the State of H.P.