

(2021) 11 SHI CK 0083

In the High Court Of Himachal Pradesh

Case No : First Appeal From Order (MVA) No.4095 Of 2013

Oriental Insurance Company Ltd. Divisional Office

APPELLANT

Vs

Gorkhi Devi And Others

RESPONDENT

Date of Decision : 29-11-2021

Acts Referred:

Motor Vehicles Act, 1988 — Section 166
Evidence Act, 1872 — Section 62, 63, 74, 76, 77

Citation : (2021) 11 SHI CK 0083

Hon'ble Judges : Jyotsna Rewal Dua, J

Bench : Single Bench

Advocate : G.C. Gupta, Meera Devi, Parveen Chauhan, Ashir Kaith, Hamender Chandel

Final Decision : Allowed

Judgement

Jyotsna Rewal Dua, J

1. In an injury case, learned Motor Accident Claims Tribunal, Chamba, awarded a compensation amount of Rs.7,64,500/-to the claimant-respondent No.1 alongwith interest @ Rs.7.5% from the date of filing of petition till its realization. This award has been assailed by the insurance company on the ground of being perverse, contrary to the evidence on record and not in consonance with law.

2. Facts

2(i) Respondent No.1 filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 for the grant of compensation of Rs.16,00,000/- from the respondents. Claimant-respondent No.1 submitted in the claim petition that she was travelling in a bus bearing registration No.HP-48-3321 on 14.08.2009 and was going from Salooni to Chamba. The bus was being driven in rash and negligent manner by its driver-respondent No.3. Because of his negligent driving, an accident occurred, wherein she sustained grievous injurious in her left leg. She was taken to the Regional Hospital Chamba for treatment from where she

was referred to Dr. RPGMC Tanda. She remained admitted in the medical college & hospital Tanda from 15.08.2009 to 29.09.2009 and thereafter again from 12.02.2010 to 16.02.2010. She has been assessed to be suffering from 70% permanent disability in relation to injuries suffered by her in the accident. The claimants asserted that her age was 34 years at the time of accident. She was a house-wife, agriculturist and was earning Rs.8,000/- per month.

2(ii) Learned Motor Accident Claims Tribunal vide impugned award dated 30.05.2013 held that claimant-respondent No.1 sustained injuries due to rash and negligent driving of the vehicle in question by respondent No.3.

The issue of accident having been caused by rash and negligent driving of the vehicle in question by respondent No.3 has attained finality. The findings of learned Motor Accident Claims Tribunal in this regard as given in various other awards arising out of the accident in question have been upheld by a Coordinate Bench of this Court in FAO No.256/2010 titled Oriental Insurance Compnay Vs. Smt. Indiro & Others [(2015) 3 Him L.R. 1677] alongwith other connected cases decided on 19.06.2015.

In the instant case the award has been impugned on grounds pertaining to quantum of compensation determined by the learned Tribunal.

3. I have heard Mr. G.C. Gupta, learned Senior Counsel assisted by Ms. Meera Devi, learned counsel, for the appellant, Mr. Parveen Chauhan, learned counsel and Mr. Ashir Kaith, learned vice counsel, for respondents No.1 and 2, respectively and have also gone through the record of the case.

4 In the facts and circumstances of the case, the impugned award deserves to be set aside for the following reasons:-

4(a) Learned Tribunal below has held the claimant-respondent No.1 entitled to following amounts of compensation under different heads;- (i) compensation for loss of earning for 15 days when the petitioner remained admitted in the hospital: Rs.1500/- (ii) loss of future income: Rs.4,03,000/- (iii) compensation on account of medicines: Rs.50,000/- (iv) compensation on account of attendant charges: Rs.5,000/- (v) compensation on account of special diet charges: Rs.5,000/- (vi) compensation on account of pain and sufferings: Rs.1,50,000/- (vii) compensation for loss of amenities of life: Rs.1,50,000/-. Total amount of compensation: Rs.7,64,500/-.

In allowing claimant-respondent No.1 the above compensation amount, the reasoning given by the learned Tribunal is as under:-

"28. However, taking into consideration the evidence of the petitioner and the fact that her age at the time of accident was 34 years, her multifarious services for managing the entire family being a house wife, even on a modest estimation, it can safely be held that the petitioner income from all sources at the relevant time was approximately Rs.3000/- per month or say Rs.36,000/- per annum.

29. Dr. Prashant Rana PW-2 has proved the disability certificate Ex.PW2/A which shows that the petitioner locomotor has been impaired as her left leg has been amputated and the nature of the disability is permanent and it was to the extent of 70%. He has admitted this disability is not regarding whole of the body. Since the left leg of the petitioner has been amputated and she has suffered permanent disability to the extent of 70% and the petitioner remained hospitalized for 15 days and thus there is loss of earning of Rs.1500/- and the loss of future earning on account of permanent disability which comes to Rs.2100/- per month (70% of Rs.3,000/-). Since at the time of accident, the petitioner was 34 years old, the appropriate multiplier would be 16. Thus the total loss of future income to which the petitioner is entitled to comes to Rs.4,03,200 (Rs.2100/- x 12 x 6).

30. The petitioner has also submitted the medical bills and transportation receipts Ext.PW3/A to Ext.PW3/F, Ext.PW4/1 to Ext.PW4/6 amounting to Rs.38,575/-. Thus the petitioner is awarded Rs.50,000/- on account of medical expenditure and transportation charges, which she had incurred. The petitioner is also entitled to Rs.5,000/- on account of attendant charges Rs.5000/- on account of special diet Rs.1,50,000/- on account of pain and sufferings and Rs.1,50,000/- on account of loss of amenities of life. Thus, in total, the petitioner is held entitled to the following amounts of compensation under different heads:

(i) compensation for loss of earning for 15 days when the petitioner remained admitted in the hospital: Rs.1500/-

(ii) loss of future income: Rs.4,03,000/-

(iii) compensation on account of medicines: Rs.50,000/-

(iv) compensation on account of attendant charges: Rs.5,000/-

(v) compensation on account of special diet charges: Rs.5,000/-

(vi) compensation on account of pain and sufferings: Rs.1,50,000/-

(vii) compensation for loss of amenities of life: Rs.1,50,000/-

Total amount of compensation: Rs.7,64,500/-."

4(b) The only medical evidence produced by the claimant respondent No.1 in support of her case is a disability certificate Ext. PW2/A. In this certificate, the category of disability suffered by the claimant-respondent No.1 has been indicated as 'Locomotor Impaired'. The nature of disability has been reflected as permanent. Certificate also carries remark 'left leg amputated'. The certificate has been proved by Dr. Prashant Rana, who appeared as PW2. He has not stated that he had examined respondent No.1 or that the certificate in question was issued by him or that he was member of the board, which allegedly issued the certificate to respondent No.1. His only statement as PW2 in this regard is that he has verified the certificate with the original in their record. Why should the

original disability certificate of respondent No.1 remain in their record and not with the claimant is another question went unanswered. It is well settled that mere marking of a document as exhibit will not automatically prove the document. The document has to be proved in accordance with law, in accordance with relevant provisions of the Indian Evidence Act. The disability certificate has not been proved in accordance with law. In *National Insurance Company Vs. Nant Ram & Others*, Latest HLJ 2005 (HP) 153, it was held as under:-

"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 the 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 twofold; firstly, that such a witness appearing in the court is sworn and under oath testifies 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, under Section 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 the 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 the Tribunals and also include documents from public officers, legislative, judicial as well as executive. Under Section 76 of the Evidence Act every public officer having the custody of a public document, which any person has a right to inspect, has a duty to give to such a person on demand a certified copy of such document. Under Section 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 under Section 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 insofar 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 view to ensuring that the documents of suspicious or doubtful character or documents which are liable to be disputed by 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."

In Oriental Insurance Company Vs. Sh. Parveen and others 2011(2) Him L.R. 1007, It was held that disability certificate is not a public document and therefore must be proved in accordance with law. It is only the doctor, who issued the certificate or had examined the claimant, who can verify what is the disability suffered by the claimant. Relevant paras from the judgment are as under:-

"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.

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"

In the instant case, the certificate of disability has not been proved by examining the author of the certificate, therefore, it could not have been taken into consideration ipso-facto.

4(c) As per the remarks appearing on the certificate Ext.PW2/A, the disability certificate was issued in view of amputation of left leg of respondent No.1. This has also been so stated by PW2, Dr. Prashant Rana. However, no such case has been pleaded by respondent No.1 in her claim petition. In the claim petition, respondent No.1 had submitted having suffered grievous injuries in her left leg in the accident. No averment about amputation of left leg of the claimant exists in the claim petition filed on 28.11.2011. Even in her affidavit dated 15.10.2012 (Ex.PW3/A) submitted by way of examination-in-chief, the claimant has not stated anything about amputation of her left leg due to injury suffered in the accident. She has only talked about suffering grievous injuries in left leg due to the accident. This raises doubts as to whether the disability allegedly suffered by respondent No.1 in terms of the certificate (Ext.PW2/A) is on account of injuries

suffered by her in the accident in question or not. Relationship between the injuries suffered by the claimant in the accident and her disability is neither pleaded nor proved.

4(d) The certificate Ext.PW2/A was issued on 17.06.2011, whereas respondent No.1 had allegedly suffered injuries in the accident on 14.08.2009. The certificate, therefore, is not proximate to the date of accident. Respondent No.1 has not examined any doctor to prove that the disability allegedly suffered by her in terms of Ext.PW2/A was result of the accident in question. In this regard, it will be appropriate to refer to 2008 ACJ 2131, titled Rajesh Kumar Vs. Yudhvair Singh and another, the Hon'ble Supreme Court held as under:-

"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. Whether the disability at 60% was calculated on the basis of the provisions of the Workmen's Compensation Act or otherwise is not known. It is also not known as to whether he was competent to issue such a certificate. It even does not appear that the contentions raised before us had either been raised before the Tribunal or the High Court. The Tribunal as also the High Court, therefore, proceeded on the materials brought on record by the parties. In absence of any contention having been raised in regard to the applicability of the Workmen's Compensation Act which, in our opinion, ex facie has no application, the same, in our opinion, cannot be permitted to be raised for the first time."

4(e) Learned Tribunal on the basis of disability certificate Ext.PW2/A proceeded to award compensation in favour of claimant-respondent No.1. 70% disability reflected in the certificate was taken as resulting into 70% loss in the earning of respondent No.1. This was not in consonance with law laid down by the Hon'ble Apex Court in (2011) 1 SCC 343 titled Raj Kumar Vs. Ajay Kumar & another, wherein it was held that in case claimant suffers permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earning would depend upon effect and impact of such permanent disability on his earning capability. The tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. What requires to be assessed is the effect of permanent disability on earning capacity of the injured. Relevant paras from the judgment are as under:-

"10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be

different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in *Arvind Kumar Mishra V. New India Assurance Co. Ltd.* 2010(10) SCALE 298 and *Yadava Kumar V. D.M. National Insurance Co. Ltd.* - 2010 (8) SCALE 567).

12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence:

- (i) whether the disablement is permanent or temporary;
- (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement,
- (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is

totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity."

The above judgment was relied upon in (2020) 1 SCC 796 titled Chanappa Nagappa Muchalagoda Vs. Divisional Manga, New India Insurance Company Ltd. and reaffirmed in Pappu Deo Yadav Vs. Naresh Kumar & others (2020) SCALE 192.

4(f) Learned Tribunal has allowed compensation to respondent No.1 on account of transportation charges. However the taxi bills placed on record do not bear any date whatsoever and have been issued in the name of one Madho Ram. Whether these bills were worth accounting for in light of statement of PW4 Madho Ram, has not been considered by the learned Tribunal.

4(g) Medical expenditure has been allowed to respondent No.1 by the learned Tribunal. However, but for the medicine bills dated 20.08.2009 (Ext.PW3/E) and dated 15.8.2009 (Ext.PW3/F), all other medicines bills placed on record at Ext.PW3/B to PW3/D bear 18.12.2009 as date of purchase of medicines, whereas the accident in question took place on 14.08.2009. Different bills of same date from same medical store have been issued. These aspects have not been considered by the learned Tribunal. It has been assumed that respondent No.1 was hospitalized, whereas no such record is available in the file. No evidence in that regard was adduced. Attendant charges have been allowed to respondent No.1, whereas there is no evidence for the same. Compensation for the loss of

amenities of life has been awarded to respondent No.1. However Hon'ble Apex Court in Raj Kumar's case supra had held that it is only in cases of serious injury, where there is medical evidence corroborating the evidence of claimant that compensation can be granted for loss of amenities of life. Medical evidence is lacking in the instant case.

5. The sum total of above discussion is that the award passed by the learned Tribunal is not in consonance with law. The compensation assessed is also dehors the factual & legal position. Consequently, instant appeal filed by the Insurance Company is allowed. The impugned award dated 30.05.2013 passed by the learned Motor Accident Claims Tribunal, Chamba Division Chamba H.P. in MAC Petition No. 97/2011 is set aside. The case is remanded to the learned tribunal below to decide the same afresh. Reasonable opportunity shall be given to the claimant only to produce the doctor concerned in the witness box. Parties through their learned counsel are directed to appear before the learned Tribunal on 23.12.2021. Record be returned to the learned Tribunal forthwith.