
(2019) 03 GAU CK 0049
In the Gauhati High Court
Case No : MACApp. 24 Of 2012

Oriental Insurance Co. Ltd

APPELLANT

Vs

Dilip Rabha And 2 Ors

RESPONDENT

Date of Decision : 14-03-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 173
Indian Penal Code, 1860 — Section 279, 304A, 338

Citation : (2019) 03 GAU CK 0049

Hon'ble Judges : Manish Choudhury, J

Bench : Single Bench

Advocate : S K Goswami, H Das

Final Decision : Allowed

Judgement

1. By this appeal preferred under section 173, Motor Vehicles Act, 1988, as amended, (the Act, in short), the judgment and award dated 26.03.2018 passed by the learned Member, Motor Accident Claims Tribunal (the Claims Tribunal, in short), Goalpara in MACT Case No. 288/2006 is assailed. The Claims Tribunal had awarded an amount of Rs. 4,56,800/- as compensation along with interest @6% per annum from the date of filing of the claim application on 31.07.2006 till the date of payment and the appellant herein who was the insurer of the vehicle bearing registration No. AS-18-6315 (Bus) was asked to satisfy the said award.

2. The facts leading to the institution of the case are that on 05.03.2004, at about 8.30 p.m., the Claimant, Dilip Rabha was proceeding from Dudhnoi to Agia as a passenger of the vehicle bearing registration No. AS-18/6315 (Bus) and when the said bus reached near Salpara Jungle on NH-37, the bus met with an accident. As a result of the said accident, Dilip Rabha as well as some other passengers of the bus sustained injuries. The claimant was taken to Goalpara Civil Hospital for medical treatment. It is stated that the claimant suffered head injury, comminuted fracture hip joint, fracture through transverse processes, fracture through left sacral, central herniation of L4/5 disc with thecal and neural

foraminal indentation and other injuries. It is also stated that the said accident had occurred due to rash and negligent driving on the part of the driver of the offending vehicle. In connection with the said accident, a police case being Dudhnoi Police Station Case No. 29/2004 was registered under section 279/338/304A, IPC against the driver of the bus, Md. Mahasen Ali. Stating that the resultant effect of the injuries sustained by the claimant in the said accident made him permanently disabled, the claimant, who is the respondent No. 1 herein, had instituted the claim application under section 166 of the Act before the Claims Tribunal claiming an amount of Rs. 10,00,000/- as compensation. The said claim application was registered and numbered as MACT Case No. 288/2006. The insurer, the owner and the driver of the bus were impleaded as opposite party Nos. 1, 2 and 3 respectively. In support of his claim that he had suffered permanent physical disablement, C.W.1 i.e. the claimant exhibited a certificate from the District Standing Medical Board, Goalpara as Ext.-22.

3. On receipt of notice from the Claims Tribunal, all the opposite parties appeared and contested the claim application by filing the written statements raising various objections. The appellant-insurer by filing written statement had raised the contention that the expenses and the compensation claimed by the claimant were excessive and had no material basis. By filing the written statement jointly, the driver and the owner of the offending vehicle (Bus) stated that the accident was an unfortunate accident but there was no rash and negligent act on the part of the driver of the bus. It further contended that the vehicle being insured with Oriental Insurance Company Ltd., the appellant, under a valid policy of insurance with validity up to 18.03.2004, in the event any compensation is awarded, the owner was entitled to be indemnified by the insurer of the vehicle. It further contended that the vehicle was driven by an experienced driver who had a valid and effective driving license, DL-715-GLP/F with validity up to 20.06.2004.

4. Upon consideration of the pleadings, the Claims Tribunal framed 2 (two) issues :

i) whether the accident took place due to rash and negligent driving of the driver of the vehicle bearing registration No. AS-18-6315 or the accident occurred arising out of the use of the said vehicle?

ii) whether the claimant is entitled to get any compensation, if so what should be the best compensation?

5. The claimant's side, in support of the claim application examined 2 (two) witnesses : C.W.1 - the claimant and C.W.2 - Smti. Namita Rabha. Those 2 (two) witnesses from the claimant's side were duly cross-examined on behalf of the insurer of the vehicle. A number of documents were exhibited by the said 2 (two) witnesses including the Accident Information Report in Form 54 as Ext.-2.

6. On the basis of the evidence of the witnesses on record, the Claims Tribunal took the income of the claimant as Rs. 3,000/- per month, despite his claim of earning an amount of Rs. 7,000/- per month from his business and cultivation in

the absence of and on his failure to produce any cogent evidence in proof of his income. The Claims Tribunal had considered the age of the claimant to be within the age group of 20-30 years and adopted the multiplier of 18. It was on the basis of Ext.-22 which was a certificate issued by the District Standing Medical Board, Goalpara as regards the extent of permanent physical disablement of the claimant, the Claims Tribunal proceeded to determine the amount of compensation. The Claims Tribunal, for the purpose of assessment of compensation, took the percentage of disability of the claimant as 70% on the basis of the said Ext.-22 issued by the District Standing Medical Board, Goalpara. Thereafter, the Claims Tribunal proceeded to determine the amount of compensation at Rs. 4,53,600/- (=Rs. 3,000 x 12 x 18 x 70%). Adding an amount of Rs. 3,200/- to be the expenditure incurred by the claimant towards his medical treatment, based on the documents produced before the Claims Tribunal, the Claims Tribunal arrived at a total amount of compensation of Rs. 4,56,800/- (=Rs. 4,53,600/- + Rs. 3,200/-).

7. Assailing the said manner by which the Claims Tribunal had assessed the amount of Rs. 4,56,800/- as the total amount of compensation, the instant appeal is preferred by the insurer of the bus as the appellant contending, inter-alia, that the assessment of compensation could not have been made on the basis of Ext.-22 as no Doctor who treated the claimant or no member from the District Standing Medical Board, Goalpara was examined to substantiate the plea of permanent physical disablement suffered by the claimant. Apart from the said plea, the other grounds which the appellant has taken are about the age of the claimant and grant of interest from the date of the claim application.

8. I have heard Mr. S. K. Goswami, learned counsel for the appellant and Mr. H. Das, learned counsel for the respondent No. 1-claimant. I have also perused the materials available in the case record including Ext.-22, the certificate issued by the District Standing Medical Board, Goalpara.

9. It is noticeable that no evidence of any doctor, who treated the claimant after the accident on 05.03.2004, was adduced on behalf of the claimant. When the contents of Ext.- 22 is perused it is seen that the District Standing Medical Board, Goalpara in its sitting held on 23.05.2008 at the office chamber of the Joint Director of Health Services, Goalpara examined the claimant and found that he had sustained injuries like :

- (i) Fracture transverse process of L1 to L5,
- (ii) Fracture left sacral A/a,
- (iii) Central Herniation of L4/5 Disc,

The District Standing Medical Board, Goalpara further mentioned that the claimant had, at that time,

- (i) Pain in pelvis,

(ii) Pain in lumber region,

(iii) Weakness of both lower limbs,

Observing the same, the District Standing Medical Board, Goalpara came to the conclusion that the person became permanently disabled to the extent of 85%. Ext.-22 is a certified true copy of the original certificate.

10. What is discernible from Ext.-22 is that the District Standing Medical Board, Goalpara had mentioned the injuries sustained by the claimant but the Board did not make any remark as to whether effect of those injuries were temporary disablement or permanent disablement. The District Standing Medical Board had observed that the claimant had pain and weakness in some parts of the body. Without explaining further, the District Standing Medical Board, Goalpara concluded that the claimant had suffered permanent physical disablement to the extent of 85%.

11. In *Rajkumar vs. Ajay Kumar and another*, reported in (2011) 1 SCC 343, the Supreme Court has summarized the principles as to how the compensation is to be assessed and awarded in personal injury cases. It is observed therein that mere production of a disability certificate or discharge certificate should not be readily accepted as 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 the claimant, is tendered for cross-examination with reference to the certificate. The relevant excerpts from the said decision is reproduced here under :

"18. 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."

12. It has clearly been observed therein that where the disability certificate is given by the duly constituting a Medical Board they may be accepted, subject to evidence regarding the genuineness of such certificate. 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. It is settled that the percentage of loss of earning capacity is not the same percentage of loss of physical disability, except in certain cases where the Claims Tribunal on the basis of evidence can conclude that the percentage of loss of earning capacity is the same as the percentage of loss of physical damages. The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his physical disability can give evidence only in regard to the evidence of permanent disability. The loss of earning capacity is something which would have to be assessed by the Claims Tribunal with regard to the evidence. In the said decision, *Rajkumar vs. Ajay Kumar* (supra), the Supreme Court has summarized the principles as under :

"19. 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."

13. With regard to the importance of examination of the Doctor in a case of personal injury where the claimant has asserted about sufferance of permanent disablement, a Division Bench of this Court in the case of *National Insurance Co. Ltd. vs. Chandreshwar Thakur & Ors.*, reported in 2001 (1) GLT 393, has observed as under:

"2. 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."

14. In view of the aforesaid principles as regards assessment of compensation in respect of personal injury cases qua the manner of assessment of compensation done in the instant case, it is clear that the procedure followed by the Claims Tribunal to assess the extent of permanent physical disablement and loss of earning capacity is not in consonance with the procedure required to be followed in such a case. It is also pertinent that if there is no permanent disability then there is no question of determining the loss of future earning capacity. It is already mentioned that the condition precedent for assessment of loss of earning capacity i.e. determination of extent of permanent physical disablement is not present in the instant case. In view of the discussions made above, the judgment and award passed by the Claims Tribunal is not sustainable in respect of the assessment of compensation of Rs. 4,56,800/- and, accordingly, the same is set aside.

15. It is projected by the claimant all throughout that he had sustained serious injuries in the motor vehicular accident that occurred on 05.03.2004 and as a result of the injuries sustained in the said accident, he had sustained permanent physical disablement and even after treatment, his condition has not been restored to the same condition as he was prior to the accident. It is submitted by the learned counsel for the respondent-claimant that if given an opportunity, which submission is not objected to by the learned counsel for the appellant, he would be able to prove that he has suffered permanent physical disablement which has resulted in consequent loss of his earning capacity and he may be allowed to lead the supporting as well as expert evidence in respect of Ext.-22, the disability certificate issued by the District Standing Medical Board, Goalpara. The injuries suffered by the claimant, as reflected in Ext.-22, appeared to have caused certain effects on the person of the claimant. As the claimant has not led any expert evidence to substantiate the facts as regards the effects of injuries sustained by him and pain and discomfort appeared to be subsisting on the date of examination by the District Standing Medical Board it is deemed just and proper that he should be given an opportunity to substantiate his said contentions.

16. In view of the submissions so made and for the reasons indicated herein above, it is deemed just and proper to send the matter back to the Motor

Accident Claims Tribunal, Goalpara to decide on the issue of extent of permanent physical disablement vis-a-vis loss of earning capacity of the claimant afresh. For the purpose of deciding afresh, the Claims Tribunal shall allow both i.e. the claimant and the insurer of the bus to adduce evidence afresh or additional evidence, as the case may be. In *New India Assurance Company Limited vs. Lalrammawia and Anr.* reported in 2009 (5) GLT 631, this Court while remanding a claim application to the Claims Tribunal, has also observed that if the parties choose not to summon the doctor, the Claims Tribunal shall suo moto obtain medical opinion to ascertain the percentage of disability in order to find out the loss of earning capacity of the claimant. After hearing the case afresh, a new award should be passed. If it is so found that an excess amount had been awarded earlier and disbursed to the claimant, the same shall be recovered. In *Rajkumar vs Ajay Kumar (supra)* also, it is observed that if the Claims 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/institutes) and refer the claimant to such Medical Board for assessment of the disability. In view of the procedure so indicated in the aforesaid decisions, it is provided that the Claims Tribunal should follow the same procedure and decide the matter as expeditiously as possible, preferably within a period of 6 (six) months.

17. It is submitted at the bar that the appellant-insurer had already deposited an amount of Rs. 3,00,000/- before the Registry of this Court and the said amount had already been disbursed to the respondent No. 1-claimant. In view of the same, the Claims Tribunal, after determination of the amount of compensation afresh, will abide by the directions made in *New India Assurance Company Limited vs. Lalrammawia and Anr. (supra)*. With the aforesaid directions, this appeal stands allowed. The appellant-insurer is allowed to withdraw the statutory deposit.

18. Registry is directed to transmit the case record to the Claims Tribunal immediately with a copy of this judgment.

No order as to costs.