

(2013) 02 MAD CK 0045

In the Madras High Court

Case No : C.R.P. (PD) No. 1128 of 2011 and M.P. No. 1 of 2011

Raju

APPELLANT

Vs

United India Insurance Company Limited

RESPONDENT

Date of Decision : 27-02-2013

Acts Referred:

Evidence Act, 1872 — Section 45
Motor Vehicles Act, 1988 — Section 163A, 169, 195
Penal Code, 1860 (IPC) — Section 376
Workmens Compensation Act, 1923 — Section 20(3)

Citation : (2013) 2 LW 437 : (2013) 3 MLJ 134

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : C. Kulanthaivel, for the Appellant; K.S. Narasimhan, for the Respondent

Judgement

M. Venugopal, J.—The Revision Petitioner has focused the present Civil Revision Petition before this Court, as an aggrieved person, as

against the order dated 21.12.2010 in I.A. No. 549 of 2010 in M.C.O.P. No. 418 of 2008 passed by the Learned Additional District Judge

(Claims Tribunal), (Fast Track Court No. IV), Bhavani, Erode District, in directing the Revision Petitioner/Petitioner to appear before the Medical

Board, Erode, for proper assessment of his "Permanent Disability". The Learned Counsel for the Petitioner/Claimant/Respondent urges before this

Court that the trial Court has committed an error in allowing the I.A. No. 549 of 2010 in M.C.O.P. No. 418 of 2008 on the file of the trial Court

(filed by the Respondent/Insurance Company) dated 21.12.2010.

2. According to the Learned Counsel for the Petitioner/Claimant, the trial Court has failed to appreciate a vital fact that I.A. No. 549 of 2010 in

M.C.O.P. No. 418 of 2008 on the file of the trial Court is per se not maintainable in law, because of the fact that the Respondent/3rd Respondent/

Insurance Company has filed the said Interlocutory Application without making an endeavour to disprove the Disability Certificate produced by

PW2-Doctor (examined on the side of the Claimant) and further on the wrong premise, the Respondent/ Insurance Company apprehends that the percentage of the disability mentioned by PW2 is on the higher side.

3. Lastly, it is the plea taken on behalf of the Petitioner/Claimant that under the Indian Evidence Act, 1872, no one can be permitted to create

documents and evidence to disprove the evidence already adduced on behalf of the Petitioner/Claimant, based on assumptions and apprehensions.

4. At this stage, the Learned Counsel for the Petitioner/Claimant cites the decision National Insurance Co. Ltd., Motor Third Party Claims Office,

No. 751, Mount Road, III Floor, Chennai - 600002 Vs. A.P. Prasanna Venkatesh and R.M. Ramasamy , at Page 344 in Paragraphs 21 to 23, it

is observed and laid down as follows:

21. The Claims Tribunal is presided over by a Senior Judge of the Subordinate Judiciary. As per Section 169 of the Motor Vehicles Act, the

Claims Tribunal shall have all the powers of a civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses

and of compelling the discovery and production of documents and material objects. The Claims Tribunal is also deemed to be a civil Court for all

the purposes of Section 195 and Chapter XXVI of the Criminal Procedure Code, 1973. The Claims Tribunal was also given the discretion to take

the assistance of one or more persons possessing special knowledge of any matter relevant to the inquiry so as to enable the Tribunal to come to a

correct conclusion for the purpose of awarding just compensation. Therefore, there is an inbuilt procedure prescribed under the Motor Vehicles

Act for the purpose of coming to a correct conclusion.

22. The correctness of the Disability Certificate is a matter to be gone into by the learned Claims Tribunal. While arriving at a conclusion as to

whether the claimant has sustained the disability as found mentioned in the disability certificate, the Claims Tribunal was expected to consider the

injuries as per the wound certificate as well as the case sheets produced on the side of the claimant, the details furnished in the disability certificate

as well as the evidence of the doctor, who had issued the disability certificate. The Tribunal was entitled to have a critical analysis of the evidence

tendered by the medical officer. The details which were brought out on cross-examination of the medical officer by the insurance company with

reference to the certificate could also be taken into consideration by the Tribunal. It was not the grievance of the petitioner that the insurance

company was not permitted to cross-examine the medical officer on the basis of the guidelines prescribed for issuance of disability certificates.

There was nothing in the affidavit filed in support of the application before the lower Court to suggest that the petitioner was denied the opportunity

to cross-examine the medical officer. Therefore, I am of the view that the learned trial Judge was perfectly correct in his finding that the application

was clearly not maintainable.

23. Therefore, I do not find any merit in the contention of the petitioner. However, the rejection of the application for subjecting the claimant before

the Medical Board would in no way prevent the petitioner from filing an application to recall the medical officer for the purpose of further cross-

examination on the basis of the prescribed guidelines issued for assessing the disability and in the event of making any such application to recall the

witness, the same should be considered by the Claims Tribunal on merits and as per law.

5. He also relies on the decision of this Court R. James Vs. Assistant Manager, National Insurance Co. Ltd., , at page 470, wherein in paragraphs

4 and 5, it is observed and held as under:

4. Pending O.P. the respondent Insurance Company filed I.A. No. 204 of 2002 seeking direction to examine the claimant by the Medical Board,

Chennai. The learned Subordinate Judge, by the impugned order, after holding that the disability certificate Ex. P.13 issued by the Doctor P.W.3 is

on the higher side, allowed the application of the Insurance Company and directed the claimant to undergo medical examination before the Medical

Board. The approach of the learned Subordinate Judge cannot be appreciated. It is seen that in support of the claim of the injured claimant, the

Doctor who assessed the disability of the injured, was examined at P.W.3 and he assessed disability of the claimant to the extent of 70%. He also

issued disability certificate, which has been marked as Ex. P.13. There is no

dispute that the respondent herein/ Insurance Company was afforded an opportunity of cross-examining the Doctor with reference to the disability suffered by the claimant and assessed by him (Ex. R.13). In such a circumstance, I am unable to understand how the Insurance Company is justified in filing a petition seeking direction for examination by the Medical Board.

5. As stated earlier, if there is any flaw either in the assessment or in the certificate issued by the Doctor, the same can be highlighted at the time of argument. When such recourse is available, I am unable to accept the view expressed by the learned Subordinate Judge. In a matter like this, particularly, claiming compensation in a motor vehicle accident, if the victims are subjected to such recourse as ordered by the Tribunal, it would be difficult for them to substantiate their claim. It is settled law that the procedures to be followed in motor accident cases, are summary in nature.

6. That apart, the Learned Counsel for the Petitioner/Claimant draws the attention of this Court in the decision Bajaj Allianz General Insurance Co.

Ltd., NO. 25/26, College Road, Prince Towers, 4th Floor, Chennai-600 006 v. Arul @ Arul Jaberaj and another, 2012 (2) TN MAC 386,

wherein it is at Paragraphs 4 to 6 observed and held as follows:

4. The averments made in the affidavit in my considered view are not sufficient to refer the Claimant to the Medical Board. When the Petitioner has cross-examined the three Doctors, who have been examined on the side of the Claimant and when the Petitioner itself has examined a Doctor to prove the disability of the Claimant, the question of referring the Claimant to the Medical Board does not arise, especially on the averments made in the Affidavit of the Petitioner.

5. Learned Counsel for the Petitioner relied on the decision Raj Kumar Vs. Ajay Kumar and Another, . Even in the said decision of the Hon"ble

Apex Court held that if the Tribunal is not satisfied with the Medical Evidence produced by the Claimant, he has to constituted a Medical Board

and refer the Claimant to the Medical Board to assess the disability. That does not mean, in each and every case, the injured shall be referred to

the Medical Board. In the case on hand, the Tribunal came to the conclusion that the Claimant need not be sent to the Medical Board giving

cogent reasons. I do not find any infirmity or illegality in the said order.

7. At this stage, a perusal of the contents of averments in I.A. No. 549 of 2010 filed by the Respondent/Insurance Company shows that the

Respondent/Claimant has examined Dr. A.K. Thambiraj, as Witness PW2 on his side in support of his claim for compensation, in regard to the

compensation claimed in the Claim Petition. It is not in dispute that PW2 Dr. A.K. Thambiraj has adduced evidence and also, furnished a Disability

Certificate assessing the permanent disability sustained by the Petitioner/Claimant at 45%. PW2 (Doctor) has not given treatment to the

Petitioner/Claimant, which fact is not in dispute.

8. Before the trial Court, in the main Claim Petition in M.C.O.P. No. 418 of 2008, the Doctor, who treated the Revision Petitioner/Claimant, has

not been examined as witness on his side.

9. Only with a view to assess the exact percentage of disability sustained by the Petitioner/Claimant (in the accident that has taken place on

04.09.2008 at about 04.40 PM in Sankari to Salem Main Road, Konganapuram Intersection, Near Lorry Association Building), for awarding just

and fair compensation, the Respondent/ Insurance Company has filed I.A. No. 549 of 2010 in M.C.O.P. No. 418 of 2008 on the file of the trial

Court u/s 45 of the Indian Evidence Act. In pith and substance, the Respondent/ Insurance Company has sought for a direction in I.A. No. 549 of

2010 in M.C.O.P. No. 418 of 2008, directing the Revision Petitioner/Petitioner/ Petitioner (Respondent) to appear before the Medical Board,

Erode headed by the Joint Director of Medical Science, Erode Government Headquarters Hospital, Erode, to assess whether the

Respondent/Petitioner (Claimant) is having a permanent disability as assessed by PW2 (Doctor), if not, to assess his exact and appropriate

percentage of disability.

10. The Revision Petitioner/Claimant filed a counter to I.A. No. 549 of 2010 in M.C.O.P. No. 418 of 2008 before the trial Court (Claims

Tribunal) inter alia stating that "while arriving at a conclusion as to whether the claimant has sustained the disability as mentioned in the Disability

Certificate, this Tribunal was expected to consider the injuries as per the Wound Certificate as well as the Case Sheets produced by him and

further, the Tribunal is entitled to have a critical analysis of the evidence adduced by PW2 (Doctor).

11. Also, a plea has been taken by the Claimant (before the Tribunal) which proceeds to the effect that the Tribunal is not bound to accept the

Disability Certificate furnished by PW2 (Doctor) as a "Gospel Truth" and that the Disability Certificate has to be proved like any other document

in the manner known to law. Furthermore, "Burden of Proof is always on the claimant to prove his disability etc.

12. Added further, the Claimant (Petitioner) has taken a stand before the Tribunal that PW2 (Doctor) has correctly assessed the disability

sustained by the Claimant and the only option available to the Respondent/ Insurance Company is to cross examine PW2. As a matter of fact, the

Revision Petitioner/Claimant has categorically taken a stand in the counter in I.A. No. 549 of 2010 that "practically, it is not possible to all the

claimants to obtain Disability Certificate by the Doctor, who treated the claimants like the Respondent/Petitioner".

13. In this connection, this Court worth recalls the observation of Lord President Cooper in regard to the function of expert witnesses (Davie v.

Edinburgh Magistrates (1953) SC 34) wherein it is stated thus:

The duty of the experts is to furnish the judge or jury with necessary scientific criteria for testing the accuracy of their conclusions, so as to enable

the judge or jury to form their own independent judgment by the application of their criteria to the facts proved in evidence.

14. Further, it is to be noted that "although the expert witness has not escaped criticism, he is probably the best means, compatible with the

adversary system, of furnishing the judge and jury with information on matters calling for expertise" (Cross, 5th Ed., p.447). In Law, "opinion"

means any inference from observed facts. The drawing of inference is the duty of the Judge. However, it is the role of a witness to state facts only

viz., what they themselves have seen or heard or perceived by any other sense and not to drawing inference from what they had seen as per

decision of the Honourable Supreme Court Babuli alias Narayan Bahera Vs. The State of Orissa, .

15. Also, one must bear in mind that "a witness may not give his opinion on matters which the Court considers call for the special skill or

knowledge of an expert unless he is an expert in such matters and he may not give his opinion on other matters if the facts upon which it is based

can be stated without reference to it in a manner equally conducive to the ascertainment of truth (Per Lord Macdermott in Sherrard v. Jacob

(1965) NI 151; Cross, 5th Ed., P.442)

16. This Court pertinently points out that the opinion of an handwriting expert is a relevant fact and the same is admissible in evidence. It is to be

borne in mind that it is not the ambit of an Expert to take the role of the Trial Judge or the Jury. Undoubtedly, the opinion tendered by an Expert

u/s 45 of the Indian Evidence Act, 1872, is to be treated as a relevant one.

17. A Court of Law is to be circumspect and act with caution when an Expert particularly is in Court Witness Box. It is the fundamental duty of the

Court of Law to see whether there is any reasonable and genuine case made out by a party for an examination of an Expert.

18. This Court worth recalls the decision Parmeshwar Sopan Gaikwad Vs. The State of Maharashtra, wherein it is held that "the confirmity

between ocular and medical evidence makes the evidence worthy of notice."

19. Also, this Court cites the decision Piara Singh and Others Vs. State of Punjab, , wherein it is held as follows:

Where the opinion of a medical witness is contradicted by another medical witness both of whom are equally competent to form an opinion, the

opinion of that expert should be accepted which supports the direct evidence in the case (1869) ii Suth WR (Cri) 25, Rel. on.

20. This Court, in the interest of Justice, cites the decision Thakur and others v. State, Complainant, AIR 1955 Allad 189, wherein it is held

hereunder:

Where there is a conflict between the medical evidence and the oral testimony of witnesses, the evidence can be assessed only in two ways. A

Court can either believe the prosecution witnesses unreservedly and explain away the conflict by holding that the witnesses have merely

exaggerated the incident or rely upon the medical evidence and approach the oral testimony with caution testing it in the light of the medical

evidence. The first method can be applied only in those cases where the oral evidence is above reproach and creates confidence and there is no

appreciable reason for the false implication of any accused. Where the evidence is not of that character and the medical evidence is not open to

any doubt or suspicion, the only safe and judicial method of assessing evidence

is the second method.

21. Also, this Court quotes the decision *Mayur Panabhai Shah Vs. State of Gujarat*, wherein it is held as follows:

This is an appeal by special leave directed against the judgment passed by a single Judge of the Gujarat High Court summarily dismissing an appeal

preferred by the appellant against an order passed by the Additional Sessions Judge No. 11, Ahmedabad, convicting the appellant of the offence

u/s 376 of the Indian Penal Code and sentencing him to imprisonment for a period of one year. We think that this is not a case which should have

been summarily rejected by the learned Single Judge and moreover we do not think that the learned Judge was right in observing that "our courts

have always taken the doctors as witnesses of truth." Even where a doctor has deposed in court, his evidence has got to be appreciated like the

evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth. We would therefore allow the

appeal, set aside the judgment of the Single Judge and remand the appeal to the High Court with a direction that the appeal may be admitted and

after issuing notice to the State it may be disposed of on merits. It would be preferable if the appeal is heard by a Judge other than the learned

Judge who heard the appeal at the stage of admission.

22. It is to be noted that in respect of personal injuries sustained by the Claimants, the assessment of disability has appropriate relevance for

deciding the quantum of compensation to be awarded in given cases. Exact physical measurements and unbiased assessments are requisite factors

for presenting an accurate Medical Report. No wonder, the "Assessment of Disability" sustained by a petitioner/ Claimant for personal injuries is

undoubtedly a technical exercise and in this regard, the Claims Tribunals more often than not fall back upon the Doctors evidence. The

compensation is to be arrived at under the Workmen's Compensation Act, 1923, as a bearing in regard to the percentage of loss of earning

capacity arising out of disability sustained, in accordance with the Schedule-I of the Act. However, Schedule-II of the Motor Vehicles Act, speaks

of a structured formula, which is to be applied for liability on no fault basis as per Section 163A, which also specifies that injuries which are

deemed to result in disablement and percentage of loss of earning power, which

in turn will be in accordance with the Schedule 1 of the Workmen's Compensation Act.

23. The Motor Vehicles Act does not either define or provide classifications of disabilities. In this connection, it is to be pertinently pointed out that

the Workmen's Compensation Act speaks of definition pertaining to the disabilities in relation to the percentage of earning capacity. It cannot be

lost sight of that the Workmen's Compensation Act, 1923, provides for a formulae to compensate an Homo-sapien in regard to the loss he

sustained. For the disability sustained by an individual a responsibility is fastened on an "Employer" to provide the payment of compensation.

Interestingly, the Workmen's Compensation Act speaks of (1) The Permanent Total Disablement (2) Temporary Total Disablement (3) Permanent

Partial Disablement and (4) Temporary Partial Disablement. However, the Motor Vehicles Act does not contain any definition of the categories

mentioned supra.

24. The compensation for continuing or permanent disability is a separate head of claim under the Motor Vehicles Act. With the assistance of

Expert witnesses evidence viz., the Doctors, the Tribunals/Law Courts are awarding compensation in Accident claims cases.

25. It is relevant for this Court to aptly quote the words of Judith Goodwin Greenwood in her essay, History of disability as a legal construct,

whereby and whereunder she has stated the following ""Not only is pressure for expansion (of the concept of disability) exerted by individuals with

perceived needs, but also by those who profit from the System as well. Physicians and other providers can expand the duration and definition of

disability with questionable tests and treatments for which they receive payment, and attorneys set fees that are contingent on proving that the

individual is disabled. Neither physicians, the official gatekeepers of the impairment boundary, nor attorneys, who are better served by the popular

conception of disability than by the stricter administrative legal concept, have any professional interest in securing a firm boundary for disability. The

only real beneficiaries against the expansion of disability are the insurers and financiers. (American Medical Association Publication on Disability

evaluation, edited by Stephen L. Demeter, Gunnar B.J. Anderson, George M. Smith, Mosby edition, 1996)

26. An expert Doctor's evidence ought to be medically demonstrated by means of anatomical, physiological or physiological abnormalities etc.

Precise measurements and recordings of range of motion, muscle strength, power, endurance, coordination, agility and effort are all relevant factors

to be taken into account. A Medical Certificate/Report recording the individual's disability is a valuable record, which will speak for itself the

disability, he is suffered at the time of accident etc.,

27. An expert Doctor's opinion is to assist the Court, which in turn is only advisory in nature. But, the same is not binding on the witness or fact.

After all, an "Expert Doctor's Evidence" is only a piece of evidence like any other evidence, which is to be assessed by the Tribunal, by a Court of

Law either oral documentary evidence on record in coming to a particular finding.

28. u/s 20(3) of the Workmen's Compensation Act, 1923, the Commissioner is vested with the discretion for deciding any matter referred to him

for decision under the Act to select one or more individuals having special knowledge/Special skill of any matter pertaining to the enquiry to assist

him in holding the enquiry. However, without taking recourse to such options, the Commissioner cannot on his own assess the compensation

merely based on assumptions/presumptions and conjectures. Admittedly, the Commissioner can refer a workman to any other expert for opinion.

He can also summon a Doctor when there exists, A doubt/ambiguity in the Certificate as to the loss of earning capacity and examine him, he may

also refer the claimant/Petitioner to a Medical Board to examine him and report.

29. As far as the present case is concerned, the Petitioner/Claimant before the Tribunal in the M.C.O.P. No. 418 of 2008 has examined as a

witness PW2 Doctor on his side. It appears that PW2 has given a Disability Certificate to the Petitioner/Claimant assessing the Disability sustained

by him as permanent disability at 45%. It is not in dispute that PW2 Doctor, who has issued the Permanent Disability Certificate to the Petitioner/

Claimant, it is not the person, who has treated the claimant either at the time of the injuries being sustained or at a later point of time giving

treatment to him. No doubt, it is also open to the Respondent/Insurance Company to examine another Doctor as a Medical Expert on its side to

dispute the percentage of 45% Permanent disability Certificate issued in favour of the Claimant. In the present case, the Respondent/Insurance

Company has not adopted that course instead the Respondent/ Insurance Company thought it fit to file I.A. No. 549 of 2010 in M.C.O.P. No.

418 of 2008 before the trial Court u/s 45 of the Indian Evidence Act, 1872, seeking an issuance of a direction from the trial Court in directing the

claimant to appear before the Medical Board, Erode headed by the Joint Director of Medical Science, Erode Government Headquarters Hospital,

Erode, to assess whether the claimant is having a permanent Disability as assessed by PW2. It is well within the domain of the Respondent/

Insurance Company to let in oral or documentary evidence as it decides/advises. Also, it is open to the Insurance Company to challenge the

veracity of PW2's evidence. In the instant case, who has assessed 45% of Permanent Disability Certificate to the Claimant for the injuries

sustained in the accident that has taken place on 04.09.2008 at about 04.40 PM in Sankari to Salem Main Road, Konganapuram Intersection,

Near Lorry Association Building. One cannot deny an important fact the technical rules of evidence cannot hamper a Claims Tribunal in regard to

the deliverance of substantial Justice to the parties. As such, I.A. No. 549 of 2010 filed by the Respondent/Insurance Company u/s 45 of the

Indian Evidence Act, seeking for a direction from the trial Court to direct the Claimant to appear before the Medical Board, Erode Headed by the

Joint Director Government Hospital, Erode, to assess whether he is having permanent disability assessed by PW2 etc., cannot be found fault with,

in the considered opinion of this Court. Per contra, the I.A. No. 549 of 2010 is perfectly maintainable in law. Likewise, the order of the trial Court

in allowing in I.A. No. 549 of 2010 in M.C.O.P. No. 418 of 2008 dated 21.12.2010 (filed by the Respondent/ Insurance Company) does not

suffer from any impropriety or illegality in the eye of law. Consequently, the Civil Revision Petition fails. In the result, the Civil Revision Petition is

dismissed, leaving the parties to bear their own costs. The order passed by the Learned Additional District Judge (Claims Tribunal), (Fast Track

Court No. IV), Bhavani, Erode District in I.A. No. 549 of 2010 in M.C.O.P. No. 418 of 2008 dated 21.12.2010, is hereby confirmed by this

Court for the reasons assigned in this revision. Since the M.C.O.P. No. 418 is of the year 2008 and is also in part-heard stage before the Claims

Tribunal, the respective parties viz., the Respondent/United India Insurance Company Limited, Salem (Third Respondent in the Claim Petition) and

the Revision Petitioner/Claimant are directed to lend their cooperation and assistance, in regard to the disposal of the main Claim Petition by the Tribunal, within a period of four months, from the date of receipt of a copy of this order and to report compliance to this Court without fail (including the steps to be taken for obtaining the Medical Board's Report relating to the claimant in regard to the assessment of permanent disability). Liberty is also granted to the Respondent/United India Insurance Company Limited, Salem, to examine the proper person as witness, who issued the Permanent Disability Certificate in respect of the Petitioner/Claimant (on behalf of the Medical Board, Erode) and also, to mark the said Report as an Exhibit on behalf of the Insurance Company, which event, the Petitioner/Claimant is also entitled to cross examine the said person/witness and in this regard, the trial Court is directed to provide adequate/enough opportunities to the respective parties, in the interest of Justice. Consequently, the connected M.P. No. 1 of 2011 is closed.