

(2009) 10 GAU CK 0021

Gauhati High Court (Aizawl Bench)

Case No: None

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Lalliansawmi and Another

RESPONDENT

Date of Decision: Oct. 30, 2009

Acts Referred:

- Motor Vehicles Act, 1988 - Section 170, 173

Citation: (2010) 2 GLR 399 : (2010) 2 GLT 176

Hon'ble Judges: A.C. Upadhyay, J

Bench: Single Bench

Judgement

A.C. Upadhyay, J.

Heard Mr. S.N. Meitei, learned Counsel for the appellant. None appears on behalf of the respondents.

2. The appellant, Oriental Insurance Co. Ltd., has filed this appeal u/s 173 of the M.V. Act, 1988 praying for setting aside the final award and order dated 9.10.2008 passed by the learned Member, MACT, Aizawl in MACT Case No. 93 of 2005, whereby the Insurance Company was directed to pay an amount of Rs. 4,15,800 with interest @ 9% per annum on the awarded amount from the date of filing of this claim petition till realisation.

3. The facts leading to filing of this appeal may be summarised as follows:

On 22.12.1994 at around 2. P.M. in the afternoon, the claimant was proceeding from Aizawl to North East Khawdungsei in a jeep bearing Regn. No. MZ 01-3623, belonging to one, Rotuakliana, respondent No. 2. The vehicle was validly insured with the appellant, Insurance Company. The vehicle in which the claimant was travelling met with an accident about 23 kms. away from Keifang. As a result of the accident, the claimant sustained 55% permanent disability. At the relevant time, the vehicle was driven by respondent No. 1, R. Lalhlimpuia of Tuikual "A" Aizawl. The

claimant submitted petition before MACT Aizawl claiming compensation for having suffered 55% physical disability in the vehicular accident aforesaid.

4. The appellant, Insurance Company, on receiving summon from the learned Tribunal entered appearance and submitted written statement denying the claim of the claimant on various grounds. The appellant, Insurance Company participated throughout the proceedings of the claim case by conducting cross-examination, etc., of the witnesses, produced by the claimant. The appellant also applied u/s 170 of the M.V. Act, 1988, for allowing it to contest the claim on all grounds available to the owner of the offending vehicle, which was allowed by the learned Tribunal.

5. During the course of hearing, the learned Tribunal formulated following two issues for just decision of the claim case:

(1) Whether the claim application is maintainable or not?

(2) Whether the claimant is entitled to any compensation and if so, who is liable to pay and to what extent?

6. In order to substantiate the claim, the claimant examined as many as 3 witnesses including her. The claimant took the stand that while driving the offending vehicle (Jeep), about 23 kms. away from Keifang to Champhai, the vehicle met with an accident in which she received serious bodily injuries. She was immediately hospitalised at Saitual Hospital and referred to Civil Hospital, Aizawl for further treatment. She could not recover from her injuries despite taking treatment prescribed by the doctor and at long last due to injuries so sustained, she became permanently disabled.

7. The claimant also contended that she had a shop in her village and was doing business. Thus, she could earn about Rs. 3500 per month to support her old parents, brothers and sisters consisting of 5 members. However, as a result of the accident and consequent disability, she could not continue with her business.

8. The learned Tribunal, after having evaluated the evidence led by the witnesses and on perusal of the documents relied on by the parties, awarded compensation as aforesaid giving rise to this appeal.

9. The learned Counsel for the appellant contended that the learned Tribunal relied on the certificate issued by village council president, as a proof of income of the claimant, which is highly irregular and unjustified. The learned Counsel further pointed out that such certificates are easily available and, therefore, cannot be relied on without *prima facie* proof of having a business and income thereof as stated by the claimant. In support of his contention the learned Counsel for the petitioner relied on a decision of this Court reported in New India Assurance Co. Ltd. Vs. Kawllian Thanga and Another, wherein it was held that the income certificate issued by the village council president cannot be taken into account for assessing the income of an individual, without disclosure of source of income and nature of

occupation. Merely by producing such certificates the burden of proof, on the part of the claimant does not stand discharged. Relevant extracts of the decision reads as follows:

(5) Mr. George Raju, learned Counsel for the appellant submits that the method of calculation adopted by the learned tribunal is wrong and arbitrary inasmuch as there is absolutely no proof on record to support that the deceased was earning Rs. 40,000 annually, as held by the learned tribunal. The only documentary evidence in support of the claim is a certificate issued by the president of the village council marked Exhibit C-4, which does not disclose the source of income or the nature of occupation of the deceased. Even the claimant, the elder brother of the deceased, in his deposition bus stated nothing as to how the deceased was earning Rs. 40,000 annually or to what extent he was dependent on him. Though learned Counsel for the claimant/respondent strongly opposed this submission by submitting that the certificate being admitted without objection cannot be called in question at the appellate stage, I do not find any force in the same. Even after a document is admitted in evidence it remains to be appreciated with regard to its evidentiary value. It is not difficult for any person to obtain such a certificate from a village council and by merely producing such a certificate the burden of proof, on the part of the claimant does not stand discharged. I am of the considered view that such a certificate alone without any supportive evidence that a village council is competent to issue income certificate cannot be the basis for a taking a view that the deceased was earning Rs. 40,000 annually. In the absence of any such evidence regarding income, the notional income provided in the second schedule of the Act being Rs. 15,000 annually has to be accepted. Thus, the multiplier chosen correctly being 17, the amount of compensation should have been Rs. 15,00,017, Rs. 2,55,000. From this amount one third has to be deducted being personnel expenses of the deceased and, thus, the net amount would come to Rs. 1,70,000 (rupees one lac seventy thousand) only.

(emphasis supplied)

10. The learned Counsel for the appellant pointed out that the learned tribunal relied on the disability certificate to conclude claimant's permanent disability of 55%, without examining the Doctor, who had evaluated and issued the certificate of disability to the claimant. Learned Counsel further contended that the certificate purported to be issued by the Medical Board of Champai bore the signatures of the Doctors working in Civil Hospital, Aizawl.

11. As a matter of fact in assessment of percentage of disability of an injured a medical expert in the field plays a crucial role. On the basis of such assessment a tribunal embarks on evaluating the loss of earning capacity triggered by disability of the claimant. The degree of disability and loss of earning capacity are not synonymous. Loss of earning capacity cannot be assessed by resorting to mere guess work. The tribunal should, for all practical purposes, take assistance of a

qualified medical practitioner to assess the extent of permanent disability of the claimant. On the other hand, none examination of the Doctor as a witness, who gave the certificate of disability, would deprive the Insurance Company to test the veracity and/or of the truthfulness of the statement and correctness of the documents placed on records by the claimant before the tribunal. The tribunal is required to assess the loss of earning capacity keeping in view the percentage of the disability suffered by the claimant. Therefore, the assessment and evaluation of the injury of the claimant is of paramount significance in proper adjudication of the claim petition. In support of his contention, the learned Counsel for the appellant has relied on the decision of the Division Bench of this Court National Insurance Co. Ltd. v. Chandreswar Thakur and Ors. 2001 (1) GLT 392, wherein it was held as follows:

(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.

12. From the above discussion, it is apparent that the evidence of medical witness is essential for assessment of the percentage of disability sustained by the injured to enable the Tribunal to adjudicate the claim. However, in the instant case the certificate of disability was relied on by the learned Tribunal without examining the doctor who had issued the certificate.

13. In the circumstances discussed above, this Court is of the considered view that the requirement of the procedure was not adequately followed by the learned tribunal before passing the award, thus, warranting remand of the proceedings, for fresh disposal in accordance with law.

14. The learned Counsel for the appellant has further contended that there was violation of the terms and conditions of the policy of the Insurance as because the offending vehicle was used as a commercial vehicle without appropriate Insurance

coverage to that effect.

15. Without lingering with the discussion any further and without tendering any views and/or decision on all such issues raised by the learned Counsel for the appellant, in the circumstances discussed above, I hereby set aside the impugned award dated 9.10.2008 passed by the learned Tribunal and remand the case to the Tribunal with the direction to start the proceeding afresh from the stage of examination of Doctor by giving both parties opportunities to adduce additional evidence, if any. The learned tribunal may also summon the Doctor, who evaluated the injury of the claimant and/or issued the certificate of disability to the claimant, and in the absence the said doctor, may examine any other qualified medical practitioner to evaluate the disability suffered by the claimant. Needless to say that the Insurance Company would be entitled to cross-examine the Doctor summoned as a witness by the learned tribunal. However, as the award has been set aside on technical ground and the entire proceeding has been remanded for retrial in accordance with law, the appellant, Insurance Company, may take up all other questions of law, related issues, etc., if any, based on facts, before the learned Tribunal.

I have consciously avoided discussing the merit of the appeal and/or the credibility or otherwise of the evidence adduced by the prosecution in the tribunal so as to enable the learned court below to remain absolutely free to come to its own independent finding.

16. With the above direction, this appeal stands disposed of.