

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 2943 OF 2018

**BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD. THROUGH
ITS AUTHORIZED SIGNATORY AURANGABAD
VERSUS
PRADIP ANANDA PATIL AND ANOTHER**

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Advocate for the Petitioner : Shri S. G. Chapalgaonkar
AGP for Respondent- State : Shri S. W. Munde

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 30th JANUARY, 2019.

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PER COURT :

1. Despite service of court notice issued on 22/03/2018, which was served in October 2018, no appearance has been entered on behalf of the contesting respondent, who is the original claimant in MACP No. 899/2009.

2. I have heard the learned Advocate for the petitioner when notice was issued and I had recorded his submissions in the order dated 22/03/2018 as under :-

"1 The Petitioner/ Insurance Company is aggrieved by the order dated 19.07.2017 passed by the Motor Accident Claims Tribunal, Dhule below Exhibit-

135 thereby, declining to refer the claimant for examination from the panel of doctors from Sasoon Hospital, Pune so as to assess his actual permanent disability.

2 The learned Advocate for the Petitioner contends that the recording of evidence has commenced. A doctor by name Siddharth Patil was examined before the Tribunal. He is an Orthopedic Surgeon having acquired the qualification of Masters of Surgery with ten years of experience. In his cross-examination in paragraph 9, he has stated that the operation performed on the claimant was successful, he could walk properly after surgery and whenever he saw him, he could walk properly.

3 The learned Advocate submits that the reason for filing the application Exhibit-135 is that the claimant was noticed driving a motor vehicle and it was then realized by the Insurance Company that his disability, which is shown to be of 75%, is untrue.

4 Issue notice to the Respondents returnable on 02.05.2018.

5 Until the returnable date in the matter, the learned Tribunal would adjourn MACP No.899/2009.

6 Copies of the petition paper book for issuance of notices shall be supplied on or before 02.04.2018, failing which, this petition shall stand dismissed without reference to the Court on 03.04.2018."

3. Under the orders of this Court, the proceedings before

the Tribunal have been adjourned. Despite the same and though notice has been served on the respondent, no appearance has been entered.

4. I have considered the strenuous submissions of the learned Advocate for the petitioner – Insurance Company. I have perused the following documents annexed which are part of the petition paper book :-

(a) The medical certificate dated 18/07/2009 issued by Dr. Neol Britto, Aastha Intensive Care Centre, Dhule.

(b) The certificate issued by the Neuro Surgeon Dr. Nikhil Shah, dated 10/09/2009.

(c) The follow-up brain scan (plain) report, dated 19/07/2009 issued by Health Vision, Dhule

(d) The detailed case record dated 14/08/2009 prepared by Dr. Nikhil Shah, Neuro Surgeon.

(f) The discharge certificate against medical advice on request dated 14/08/2009 issued by the Aastha Intensive Care Centre.

5. I have gone through the examination and cross-examination of the 4 (four) doctors recorded before the Tribunal.

6. Contention of the petitioner is that Dr. Siddharth Dhanraj Patil, who is an Orthopedic Surgeon and who had operated the patient/claimant for the purpose of joint replacement, has stated that the operation was successful and the claimant can walk properly.

7. In this backdrop, physical disability is assessed at 75 % by Dr. Charudatta Shinde of the Civil Hospital, Dhule, who was merely the disability certificate issuing authority and had never treated the claimant patient. A serious apprehension is now voiced by the petitioner that the Tribunal would rely on the disability certificate issued by a doctor, who had never treated the patient, which would be risky and the said certificate would not be dependable or reliable. For buttressing his contention, he relies upon the observations of the Honourable Apex Court in paragraph Nos. 16, 17, 18 and 19 in the case of *Raj Kumar vs. Ajay Kumar and another, (2011) 1 Supreme*

Court Cases 343, which read as under :-

"16. The Tribunal should not be a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular, the extent of permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to "hold an enquiry into the claim" for determining the "just compensation". The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the "just compensation". While dealing with personal injury cases, the Tribunal should preferably equip itself with a medical dictionary and a handbook for evaluation of permanent physical impairment (for example, Manual for Evaluation of Permanent Physical Impairment for Orthopaedic Surgeons, prepared by American Academy of Orthopaedic Surgeons or its Indian Equivalent or other authorised texts) for understanding the medical evidence and assessing the physical and functional disability. The Tribunal may also keep in view the First Schedule to the Workmen's Compensation Act, 1923 which gives some indication about the extent of permanent disability in different types of injuries, in the case of workmen.

17. If a doctor giving evidence uses technical medical terms, the Tribunal should instruct him to state

in addition, in simple non-medical terms, the nature and the effect of the injury. If a doctor gives evidence about the percentage of permanent disability, the Tribunal has to seek clarification as to whether such percentage of disability is the functional disability with reference to the whole body or whether it is only with reference to a limb. If the percentage of permanent disability is stated with reference to a limb, the Tribunal will have to seek the doctor's opinion as to whether it is possible to deduce the corresponding functional permanent disability with reference to the whole body and, if so, the percentage.

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 give 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 the 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.

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 the percentage of loss of earning capacity is the same as the 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 to 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 percentage of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors. "

8. The learned Advocate for the petitioner submits, on instructions, that the claimant – respondent can be examined even by the three members Board of the Government Medical College and Hospital, Aurangabad, in relation to his head injury, physical injuries and his percentage of disability as on date. The petitioner shall bear the entire expenditure of the said examination and would even arrange for the payment of the taxi fare to the claimant alongwith out of pocket expenses for undertaking the journey from Dhule to Aurangabad for such examination.

9. Though the State is not a party, the learned AGP has graciously assisted the Court and has given the details of the Medical Board at Aurangabad which are as under :-

- (1) Medical Superintendent
- (2) Professor and Head of Orthopedic
- (3) Professor and Head of Neurosurgery,

Ghati Aurangabad

10. The Medical Board comprising of the Medical Superintendent, Professor and HOD Ortho. and Professor and HOD Neurosurgery, has conveyed through the learned AGP that the examination of the claimant could be performed on a date which may be allowed by this Court.

11. In view of the above and considering the observations of the Apex Court in the matter of *Raj Kumar (Supra)*, this petition is partly allowed. The impugned order dated 19/07/2017 stands quashed and set aside and application Exhibit 165 stands partly allowed with the following directions :-

(a) The petitioner shall deposit an amount of Rs. 5,000/- (Rs. Five Thousand only) towards travelling taxi fare and Rs. 1,000/- (Rs. One Thousand only) for out of pocket expenses, before the Tribunal within two weeks from today.

(b) The claimant would withdraw the said amount

without conditions to be utilized for undertaking the journey from Dhule to Aurangabad for his examination and the return journey.

(c) The Trial Court shall issue a specific order thereby recommending the case of the claimant before the Medical Board, Aurangabad.

(d) The claimant shall appear before the Board on 04/03/2019 in between 11.00 a.m. to 12.00 noon. The Medical Board shall do the needful as is ordered in this mater.

(e) The learned AGP shall transmit a copy of this order to the concerned Medical Officer for necessary action.

(f) The Board shall prepare its medical report after thorough examination of the claimant as regards his head injury, physical injuries and his percentage of disability in view of his accident and the said report shall be delivered by the Board to the Tribunal in a

sealed pocket.

(g) The petitioner shall deposit the costs/charges of the Board for the said purpose.

(h) The above stated exercises shall be completed on or before 31/03/2019 and thereafter the Trial Court shall proceed to decide MACP No. 899/2009 as expeditiously as possible and in any case on or before 30/09/2019.

(RAVINDRA V. GHUGE, J.)

shp/-