NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 1022 of 2014

- Shriram General Insurance Company Limited Thru- Branch Manager, Shri Ram General Insu.Co.Ltd., E/8, I.P. RIICO, Industrial Area, Sitapura, Jaipur, Rajasthan

---- Appellant / Insurer

Versus

1. Gyaneshwar Dewangan, S/o Lakhanlal Dewangan Aged About 30 Years R/o Imlibhatha, Tah. And Distt. Bilaspur, Chhattisgarh (Claimant)
2. Birbal Yadav, S/o Bhurwa Yadav, Aged About 25 Years, R/o Tikaripara, Takhatpur, Thana- Takhatpur, District : Bilaspur, Chhattisgarh (Driver)
3. Rajendra Singh Thakur S/o Bhuwan Singh Thakur R/o House No. 13, Sheetla Ward, Radhakrishna Ward, District : Kawardha (Kabirdham), Chhattisgarh

----Respondents

MAC No. 73 of 2015

- Gyaneshwar Dewangan S/o Lakhan Lal Dewangan Aged About 30 Years R/o Imlibhatha, Tah. And Distt. Bilaspur, Chhattisgarh

---- Appellant/Claimant

Versus

1. Birbal Yadav S/o Bhurwa Yadav Aged About 25 Years R/o Village-Tikripara, Takhatpur, P.S. Takhatpur, Distt. Bilaspur Chhattisgarh
2. Rajendra Singh Thakur S/o Bhuwan Singh Thakur R/o Qtr. No. 13, Shitla Ward, Radhakrishan Ward, District : Kawardha (Kabirdham), Chhattisgarh (Owner of vehicle CG 10 G-0220, through Bhoramdev Travels Bus Stand Bilaspur)
3. Shriram General Insu.Co.Ltd. Thru- Manager, Issuing Office 10003 E-Rilco Industrial Area, Sitapura, Jaipur, Tah. And Distt. Jaipur Rajasthan

---- Respondents

For Appellant/Insurance Company	:	Shri SS Rajput, Advocate
For Respondent-1/Claimant	:	Shri Q Aziz, Advocate
For Respondent-2/Driver	:	None appears
For Respondent-3/Owner	:	Shri Devesh Chandra, Advocate

Hon'ble Shri PR Ramachandra Menon, Chief Justice &
Hon'ble Shri Justice Parth Prateem Sahu
Order on Board

Per Parth Prateem Sahu, J.
14.08.2020

1. Both these appeals arising out of common award dated 30.06.2014 passed in Claim Case- 57 of 2012 by the 1st Additional Motor Accident

Claims Tribunal, Bilaspur (for short, 'Claims Tribunal') hence, both these appeals are being disposed of by this common order. Status of the parties referred in this Order are as recorded in the impugned award.

2. NA-3 /Insurance Company preferred MAC-1022 of 2014 challenging quantum of award passed by learned Claims Tribunal in favour of the applicant/injured in the impugned award adding the ground with regard to not having valid and effective driving license with NA1 (driver of offending vehicle).

3. Claimant/appellant filed MAC-73 of 2015 seeking enhancement of the amount of compensation awarded by learned Claims Tribunal, to be on lower side amongst others.

4. Facts relevant for disposal of this appeal are that on 06.07.2011 claimant-Gyaneshwar Dewangan boarded a Bus bearing No. CG10G-0220 (for short, 'offending vehicle') for going to Pandariya from Bilaspur. On the way when offending vehicle reached near Gunsari Road, it met with an accident due to rash and negligent driving of its driver, NA1. In the aforementioned accident passengers travelling in the bus suffered grievous injuries and claimant herein also suffered injuries, cut injury over his right hand. He was taken to Community Health Centre, Takhatpur, from where he was referred to CIMS Hospital, Bilaspur. Thereafter, he took treatment at Moolchand Memorial Hospital, Bilaspur and Medical College and Hospital, Nagpur.

5. Claimant filed application under Section 166 of the Motor Vehicle Act, 1988 seeking compensation of Rs.32,07,000/- mentioning therein that he was working as Mechanic at Gas and Cooker Repairing Shop, Nitin Stores, Golbazar, Bilaspur

and earning salary of Rs.8000/- per month. He was also doing part time work and earning Rs.2,000/- per month. On account of injury suffered by him on his right hand he became permanently disabled and unable to do any work.

6. NA-1, driver of offending vehicle did not appear before the learned Claims Tribunal and he was proceeded *ex-parte*.

7. NA-2, owner of offending vehicle submitted his reply, pleading therein that on the date of accident offending vehicle was insured with NA-3, Insurance Company and the liability to pay amount of compensation is upon the insurance company. The amount claimed is highly exaggerated. He further denied the injuries suffered by the claimant in the accident and pleaded that claimant was sitting on the road side with injuries by other vehicle and on humanitarian grounds, NA2 permitted the claimant to board the bus.

8. NA-3, Insurance Company submitted reply pleading that the accident was on account of negligence on the part of the driver of the offending vehicle, there was no valid and effective driving license with NA-1, driver of the offending vehicle. There was no valid permit and fitness, and there was breach of conditions of the Insurance Policy. The amount claimed is highly exaggerated.

9. Learned Claims Tribunal on appreciation of pleadings and evidence placed on record by respective parties, held that the accident is a result of rash and negligent driving of offending vehicle by NA-1, in which claimant suffered grievous injuries. On account of accidental injuries, claimant suffered permanent disability, breach of conditions of Insurance Policy could not be proved and awarded total sum of Rs.4,74,930/- as compensation to the claimant.

10. Sh.S.S.Rajput, learned counsel appearing for NA-3 Insurance Company / appellant in MAC-1022 of 2014 submitted that learned Claims Tribunal failed to consider that driver of offending vehicle is not possessing valid and effective driving license with him. It is further contended that learned Claims Tribunal awarded excessive amount of compensation without there being any proof of income of the claimant and learned Claims Tribunal has failed to consider that claimant failed to prove the functional disability in accordance with law. He submits that the impugned award be modified and amount of compensation be reduced suitably.

11. Shri Qamrul Aziz, learned counsel appearing for the claimant submits that Insurance Company has not led any evidence to prove breach of conditions of Insurance Policy. Submission made by the learned counsel for the Insurance Company that the amount of compensation awarded is excessive is not correct, in fact amount of compensation is on lower side. Claimant has also preferred an appeal MAC-73 of 2015 for enhancement of compensation. He further contended that learned Claims Tribunal has not awarded any amount of compensation towards loss of income during the period of treatment, attendant and monthly income of the claimant has been assessed on lower side. Claimant has produced oral evidence and salary certificate of Nitin Stores, where claimant was working, showing his salary to be Rs.8,000/- per month but learned Claims Tribunal has assessed income of the claimant only as Rs.5,000/- per month compensaton towards future prospects is not awarded.

12. We have heard learned counsel for the respective parties and perused record of the claim case.

13. So far as the appeal filed by the Insurance Company is concerned, they have taken grounds of no driving license with the driver of offending vehicle and further awarding excessive amount of compensation without considering that there was no proof of his functional disability.

14. To appreciate the submissions made by the learned counsel for the NA-3 with regard to breach of conditions of the insurance policy on the ground that driver of offending vehicle was not possessing valid and effective driving license on the date of accident, we have perused various documents available on record of the claim case. Copy of the Insurance Policy was not disputed by the Insurance Company and also insurance of the offending vehicle on the date of accident. The Insurance Company has not examined any witness to prove that there was no valid and effective driving license with the driver of offending vehicle on the date of accident. Insurance company has not even proved insurance policy or conditions which is available on record showing the period of insurance of offending vehicle from 22.12.2010 to 21.12.2011.

15. Onus to prove the breach of policy conditions was upon the insurer and not on claimants. The seizure memo available on record shows the seizure of license then it was for the Insurance Company to obtain the copy of license available in Criminal case and got it verified but failed to do so. The Hon'ble Supreme Court in case of **Kamala Vayani Vs United India Insurance Company Limited** reported in (2010) 12 SCC 488 has held thus:

> "7. In this case, the insurer produced a certified copy of the proceedings of the Registering Authority and Assistant Regional Transport Authority, Bangalore dated 7-7-1990 to show that the application for registration of the vehicle filed by the third respondent was rejected with an observation

> that it was open to the applicant to apply for registration in the appropriate class. But that only proved that on 7-7-1990, the vehicle did not have a permit. But that does not prove that the vehicle did not have a permit on 27-7-1990, when the accident occurred. It was open to the insurer to apply to the transport authority concerned for a certificate to show the date on which the permit was granted and that as on the date of the accident, the vehicle did not have a permit, and produce the same as evidence. It failed to do so.
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> 8. The High Court committed an error en expecting the claimants to prove that the vehicle possessed a valid permit. We are of the view that there was no justification for the High Court to interfere with the judgment and awards of the Tribunal in the absence of relevant evidence."

16. In absence of any evidence placed on record by the Insurance Company before learned Claims Tribunal, the submission made by learned counsel for the Insurance Company that there was breach of conditions of Insurance Policy is not sustainable and it is hereby repelled.

17. So far as the second ground raised by learned counsel for the Insurance Company that grant of compensation awarded to the claimant is on higher side / excessive and that too without any proof of functional disability of the claimant is concerned, we have perused the record. Perusal of record would show that the pleadings made by the claimant that he suffered accidental injuries while travelling on offending vehicle from Bilaspur to Pandariya on the offending vehicle. This pleading though denied by the Insurance Company and owner of the offending vehicle, but have not placed or brought any evidence on record to oppose pleadings of the Claimant in their reply. Therefore, pleading and evidence of the claimant that he suffered accidental injuries while travelling on the offending vehicle which met with an accident remain un-controverted.

18. Now, coming to the medical documents placed on record, the claimant produced MLC report dated 06.07.2011 as Ex.A4 and he was examined at 1.30PM, in which it is mentioned that claimant suffered crush injury over his right arm including elbow, joint and right forearm upper 1/3rd muscle and bone exposed. Ex.A5 is a document of CIMS Hospital, Bilaspur by Department of Radio Diagnosis, showing crush fracture on right arm joint. Ex.A6 is Discharge Ticket of CIMS Hopsital, Bilaspur showing the date of admission of claimant on 06.07.2011 and date of discharge on 13.07.2011. In the document it is mentioned that mild discharge present from wound site, and the patient is referred to higher centre for further management; diagnosis of side swipi injury on elbow crushing of muscles radial nerve palsy. Result has been shown as 'unchanged'. Claimant also placed on record the Discharge Card of Medical College and Hospital, Nagpur as Ex.A8, showing the date of admission on 19.07.2011 till 31.08.2011. Here there is mention of elbow crush, radial nerve injury and fixation and fusion done on 09.08.2011. Ex.A9 is another Discharge card of Medical College and Hospital Nagpur showing the admission on 02.07.2012 to 31.07.2012. In this card also earlier treatment was referred, operation and fixation done on 09.08.2011 was mentioned. In the column of Diagnosis, it is mentioned that right floating elbow, radial nerve Palsy. Ex.A10 is Discharge Card of Gayatri Hospital, Bilaspur. It is mentioned under the Diagnosis column that 'Old fracture Non-union fracture of right elbow joint' showing that the locking plate with bone graft done.

19. The aforementioned documents submitted by the claimant with regard to his treatment as in-patient in different hospitals show that the claimant suffered floating elbow and radial nerve palsy on account of accidental injuries in the accident. The claimant also placed on record X-ray report of his right arm as

Ex.A116 in which it is mentioned that comminuted fracture of upper end of Radius and Ulna and lower end of Humerus with loss of normal shape of elbow joint POP-IN-SITU. This x-ray report is of 13.07.2011. The claimant again got his right arm diagnosed with the same diagnosis centre on 11.02.2013 and SKIAGRAM of his right elbow joint was done. Skiagram view is placed on record as Ex.A11 and it is found that:

- loss of normal contour of lower end of humerus and upper end of radius & ulna
- thinning of lower end of humerus and upper end of radius & ulna
- non-union of lower end of humerus deform shape of elbow joint

20. Claimant has produced Disability Certificate as Ex.P118, issued by Orthopaedic Specialist, District Hospital, Bilaspur in which it is mentioned that non-union of fracture, humerus fracture of right ulna, ankylosis right elbow and date of x-ray has been shown as 31.12.2013. To prove the injuries, claimant has examined himself as AW-1 and Dr.S.S.Bhatia of District Hospital Bilaspur as AW-2. Dr.S.S.Bhatia has proved the Disability Certificate Ex.P118 in which he has mentioned permanent disability of the claimant as 40%.

21. Taking into account the overall documentary and medical evidence placed on record by the claimant, it is apparent that claimant suffered grievous injuries over his right hand which caused permanent disability as even after two years of the accident, it was found that there was non-union of humerus bone as detailed in Skiagram report. The first discharge card issued on 13.07.2011(Ex.A6) shows radial nerve palsy, crushing of muscles and result has been shown to be unchanged. The discharge Card of Medial College and Hospital Nagpur (Ex.A9)

also shows compound right floating elbow and Radial nerve palsy. This state of injury was after about one year of the accidental injury suffered by the claimant.

22. In view of the aforementioned injuries, we do not find any reason to disbelieve the disability suffered by the claimant on his right arm and further no reason to disbelieve the Disability Certificate issued by AW-2 who is a Government Doctor showing permanent disability suffered by the claimant on his right arm to the extent 40% considering the SKIAGRAM of the right elbow joint of the claimant taken on 11.02.2013.

23. Now the question arises for consideration is, on account of aforementioned disability suffered by the claimant of his right elbow / right humerus bone, what will be the percentage of functional disability suffered by the claimant.

24. Assessment of functional disability is with regard to assessing the loss of earning capacity of the injured on account of the disability suffered by him. For assessing the functional disability, it is required to consider the nature of injury, part of the body on which claimant/injured suffered injury, nature of disablement, looking to the status of injuries after treatment and further considering the nature of occupation and engagement of the injured claimant.

25. In case at hand, the claimant suffered crush injury over his right hand resulting in comminuted fracture over the right humerus bone and Radial nerve palsy fracture on his right ulna bone. Doctor recorded in Ex.A6 committed Radial nerve palsy and the same has been mentioned in Ex.A8 and again in Ex.A9 issued on 31.7.2012 after one year of the accident mentioning therein that right floating elbow and radial nerve palsy. These documents clearly show that right

hand of claimant suffered with palsy. SKIAGRAM of right elbow which was done on 11.02.2013, after about 1 ½ year of the accident shows non-union of humerus bone and same was diagnosed by Orthopedic Specialist of District Hospital Bilaspur while examining the claimant for issuance of Disability Certificate in which it is specifically mentioned regarding non-union fracture of humerus bone, fracture of Ulna, Ankylosis right elbow. This clearly shows that the claimant suffered Radial nerve palsy on his right hand and also non-union of humerus bone (lower hand).

26. Occupation of the claimant has been shown as mechanic of gas stoves and cookers and was working with Nitin Stores, Bilaspur. The Disability Certificate produced by the claimant mentions 40% permanent disability. Dr SS Bhatia, AW2 who issued Disability Certificate in his evidence very clearly stated that 40% disability was of permanent nature and it is for the whole body.

27. In view of the aforementioned medical evidence available on record, particularly the evidence of AW2 Dr SS Bhatia, issuing the Disability Certificate who is a Government Doctor posted at District Hospital, Bilaspur and also considering the nature of work, the claimant was doing prior to the date of accident, we do not find any reason to reassess the disability of the claimant to assess his loss of earning capacity.

28. We are of the view that learned Claims Tribunal has not committed any error in assessing permanent disability of 40% as assessed by Dr SS Bhatia, AW2 in the Disability Certificate (Ex.P118).

29. Now the question arises for consideration is what will be the loss of earning capacity of the appellant. The medical document/evidene available on record shows that appellant suffered 'Nerve Palsy' as non-union of his humerous bone. The appellant is shown to be working as Mechanic of gas stove and cooker repairing. For the nature of work in which the claimant was engaged cannot be along by one hand. He may not be able to use the injured hand to any work due to non-union. Percentage of disability for the whole body or partial may not affect the loss of earning only ith the ratio of percentage of disability on the body. Some time it may affect the earning capacity more that what disability certificate prescribes. The purpose of assessing loss of functional disability under Motor Vehicle Act, 1988 is to ascertain the loss of earning capacity of a person.

30. In the facts of the case where there is non-union of humerus, Nerve Palsy and also looking to the nature of occupation for which both hands are required to be efficient, we hold the appellant suffered 40% loss of earning capacity.

31. In view of above, submission made by learned counsel for NA3/Insurance Company that learned Claims Tribunal erred in not considering that claimant failed to prove his functional disability is repelled.

32. Hon'ble Supreme Court in the matter of **Rajkumar Vs Ajaykumar** reported in 2011 (1) SCC 343 considered the issue with regard to functional disability and held thus:

> "7. Assessment of pecuniary damages under Item(i) and under Item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future

> medical expenses – Item (ii)-depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages-Items (iv), (v) and (vi)-involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decisions of this Court and the High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability-Item (ii) (a). We are concerned with that assessment in this case."

33. Further Hon'ble Supreme Court in case of **Chanappa Nagappa Muchalagoda Vs Divisional Manager, New India Insurance Company Limited** reported in (2020) 1 SCC 796, where the claimant suffered injuries on his right leg resulting into complete disability to continue his vocation, Hon'ble Supreme Court after taking note of its earlier decisions in cases of **K Janardan Vs United India Insurance Company Limited** reported in (2008) 8 SCC 518 and **Raj Kumar Vs Ajay Kumar** reported in (2011) 1 SCC 343 has held thus :

> "14. The aforesaid judgments are instructive for assessing the compensation payable to the Appellant in the present case. As a consequence of the accident, the appellant has been incapacitated for life, since he can walk only with the help of a walking stick. He has lost the ability to work as a driver, as he would be disqualified from even getting a driving license. The prospect of securing any other manual labour job is not possible, since he would require the assistance of a person to ensure his mobility and manage his discomfort. As a consequence, the functional disability suffered by the Appellant must be assessed as 100%.
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> 15. We affirm the judgment of the High Court on assessing the income of the Appellant at Rs.4000 pm as per the evidence of his employer. The "functional

> disability" of the Appellant is assessed as 100%, and the relevant factor would be 201.66 as per Schedule IV to the Act. Consequently, the compensation payable to the Appellant would work out to Rs.4,83,984/- under Section 4 of the Act."

34. Now, we consider the amount of compensation awarded by learned Claims Tribunal is excessive or is on the lower side as the ground raised and argued by learned counsel for NA3/Insurance Company in MAC-1022 and also by the claimant / appellant in MAC- 73.

35. The claimant has pleaded that he was working as gas stove and cooker mechanic at Nitin Stores, Golbajar, Bilaspur. He also placed on record salary certificate mentioning therein that he was working as mechanic and earning Rs.200/- per day. This document has not been proved by examining the author of the document. However, looking to the facts and circumstances of the case, we affirm the finding recorded by learned Claims Tribunal with regard to the nature of work of the claimant and considering the minimum wages for the semi-skilled labour and assessing his income as Rs.5000/- per month. Looking to the nature of engagement of the claimant prior to the date of accident, minimum wages for semi-skilled labour as mentioned by learned Claims Tribunal, learned counsel for the Insurance Company could not able to point out that income assessed is on higher side by placing material before this court, we affirm income of the claimant as assessed by learned Claims Tribunal as Rs.5,000/- per month.

36. As there is 40% loss of income due to permanent disability suffered by the claimant, he will be entitled for loss of future prospects in the same ratio.

37. The issue of future prospectus has been considered by Hon'ble Supreme Court in **National Insurance Company Vs Pranay Sethi** reported in 2017 (16) SCC 680 wherein it is held that there will be 40% of addition in the established income where the age of deceased/injured is less than 40 years and is not in permanent employment or self employment. In the present case, claimant being aged below 40 years, he will be entitled for an addition of 40% of his established income towards future prospectus.

38. Learned Claims Tribunal has awarded Rs.15,000/- (5,000 x 3) towards loss of income for a period of three months, Rs.1,232/- for conveyance, Rs.5,000/- for pain and suffering, Rs.5,000/- for special diet, Rs.88,698/- towards medical expenses and Rs.3,60,000/- towards loss of income. The Claims Tribunal has not awarded towards attendant, loss of amenities in life, awarded meager amount towards conveyance and loss of income during the period of treatment in the facts and circumstances of the case.

39. Amount of compensation requires re-consideration and re-computation, which is as under:

(a) Income of the claimant is assessed @ Rs.5,000/- per month and Rs.60,000/- per annum.

(b) By adding 40% to yearly income of the claimant towards future prospects, income per annum will come to Rs.84,000/- {60000 + (60000 x 40/100)}.

(c) The appellant suffered 40% loss of earning capacity. Loss of income will be Rs.33,600/- (84000/2).

(d) Claimant has been shown to be less than 40 years of age on the date of accident. Therefore, appropriate multiplier would be 15, which makes his total loss of income as **Rs.5,04,000/-** (33600 x 15).

(e) Claimant has submitted medical bills and upon calculation, learned Claims Tribunal has awarded Rs.**88,698/-** for which, the claimant is entitled.

(f) Looking to the period of treatment as detailed herein above, claimant was under treatment as in-patient for a period of 85 days in different hospitals. Therefore, he is also entitled for amount towards attendant for a period of three months, which comes to Rs.**12,000/-** (4000 x 3).

(g) Learned Claims Tribunal has awarded only Rs.1,232/- towards conveyance expenses but looking to the pleadings and documentary evidence placed on record with regard to travelling from the place of accident to Takhatpur, from there to Bilaspur and on multiple occasions, to Nagpur, we find it appropriate to award Rs.**10,000**/- towards conveyance expenses, instead of Rs.1,232/-.

(h) The claimant suffered grievous injury of fracture of humerus bone and ulna bone and also suffered the Radial nerve injury, he was operated on multiple occasions at CIMS Hospital, Bilaspur, Medical College and Hospital at Nagpur and Gayatri Hospital, Bilapsur and he became permanently disabled. Therefore, we find it appropriate to award Rs.**25,000/-** towards pain and suffering instead of Rs.5,000/-, Rs.**5,000/-** towards special diet, Rs.**25,000/-** towards loss of amenities in life and Rs.**30,000/-** (5000 x 6) towards loss of income during the period of treatment ie for a period of six months.

40. Now, appellant/ injured claimant in MAC-73 of 2015 is entitled for a total sum of **Rs.6,99,698/-** (504000 + 88698 + 12000 + 10000 + 25000 + 5000 + 25000 + 30000) instead of Rs. 4,74,930/- as awarded by learned Claims Tribunal.

41. Aforementioned amount will carry interest @ 6% per annum from the date of claim application, till its realisation. Other conditions imposed by the learned Claims Tribunal shall remain intact.

42. In the result,

(a) MAC-1022 of 2014, appeal filed by the Insurance Company is dismissed.

(b) MAC-73 of 2015 appeal filed by the injured claimant is allowed in part and the impugned award is modified to the extent as indicated above.

Sd/-
(PR Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

padma