

IN THE HIGH COURT OF ORISSA AT CUTTACK

MACA NO.1173 OF 2007

From the Judgment/Order dated 29.09.2018 passed by the learned 1st MACT, Mayurbhanj at Baripada in MAC Case No.209/2016.

Jalil Khan

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Appellant

-:: VERSUS ::-

**Dhirendra Kumar Mohanty
& Ors.**

::::

Respondents

MACA No.145 OF 2008

**Oriental Insurance
Co. Ltd.**

::::

Appellant

-:: VERSUS ::-

**Dhirendra Kumar Mohanty
& Ors.**

::::

Respondents

**Appeared in this case by Video Conferencing Mode / Hybrid
Mode.**

For Appellant **::::** Mr. K. Panigrahi, Advocate
(for Claimant)

For Respondent **::::** Mr. M. Sinha, Advocate
(for Insurer-Company)
Mr. S.K. Swain, Advocate
(for Insurer-Company)
Mr. B.P. Tripathy, Advocate
(for Respondent No. 1)

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PRESENT :

THE HON'BLE MR. JUSTICE B.P.SATAPATHY

Date of Hearing- 06.05.2022 :: Date of Order- 19.09.2022

B.P.Satapathy, J. This matter is taken up through Hybrid Arrangement (Virtual/Physical) Mode.

2. Heard Mr. Kalpataru Panigrahi, learned counsel for the Claimant and Mr. Mahitosh Sinha as well as Mr. S.K. Swain, learned counsels appearing for the Insurer-Company in both the appeals and Mr. B.P. Tripathy, learned counsel appearing for the Respondent No. 1 in MACA No.1173 of 2007.

3. Since common question is involved in both the appeals and both the appeals have been filed against the self same impugned Judgment, both the appeals were heard analogously and disposed of vide the present common order.

4. While MACA No.1173 of 2007 has been filed by the Claimant seeking enhancement of the compensation passed by the learned 1st MACT, Keonjhar in MAC Case No. 291 of 2003 vide Judgment dtd.20.09.2017, MACA No. 145 of 2008 has been filed by the Company-Insurer challenging the quantum of compensation passed vide the said Judgment.

5. Mr. Panigrahi, learned counsel appearing for the Claimant in both the cases submitted that because of the injury sustained to the Claimant in the accident, which took place on 05.05.2003, the claim application in the aforesaid MAC Case No. 291 of 2003 was

filed claiming compensation of Rs.2,50,000/- (Rs. Two lakh fifty thousand)/- on various grounds.

6. It is submitted that during the relevant time the Claimant was doing seasonal business and he was earning around Rs.5,000/- (Rs. Five thousand) per month. It is also submitted that in the said claim application while the Claimant examined himself as P.W. 1 and supported the stand taken in the claim application including the monthly income and various documents were also exhibited in support of his injury and treatment vide Ext. 1 to Ext. 16, but no such witness was examined either by the Insurer-Company or by the Owner of both the offending vehicles in question.

7. It is submitted that in absence of any contrary evidence laid by the Insurer, learned Tribunal without proper appreciation of the materials available on record illegally held the monthly income of the injured at Rs.2,000/- (Rs. Two Thousand) per month and accordingly allowed compensation to the extent of Rs.1,75,490/- (Rs. One Lakh Seventy Five Thousand Four Hundred Ninty) + Rs.12,000/- (Rs. Twelve Thousand) towards loss of income for six (6) months.

8. Mr. Panigrahi, learned counsel for the Claimant submitted that since no contrary evidence was laid by the Insurer-Company and the Claimant in support of his income at Rs.5,000/- (Rs. Five Thousand) per month examined himself by corroborating the said fact, learned Tribunal should not have held the monthly income at Rs.2,000/- (Rs. Two Thousand).

9. Mr. Panigrahi submitted that since the Claimant was doing seasonal business, he could not produce any document in support

of his monthly income and if at all learned Tribunal disbelieved the statement of the Claimant regarding his monthly income, then the notional income of the injured should have been taken at Rs.3,000/- (Rs. Three Thousand) per month in view of the decision rendered by the Hon'ble Apex Court in the case of ***Laxmi Devi & Ors. Vs. Mohammad Tabbar & Anr. reported in 2008 (2) TAC 394 (SC)***. Hon'ble Court while upholding the finding in Para 7 held as follows:-

“7. Considering the above principles in this case, we must say that the High Court has definitely erred in bringing down the multiplier to 12. It is to be seen that in this case the deceased was 35 years old. The claimants are his wife and four minor daughters. Even as per the Second Schedule the multiplier in case of the persons between 35 to 40 years is 16. In the present case the rate of interest granted is only 6% considering the general rate of interest prevalent in 2004. In our opinion, therefore, the proper multiplier would be 14 as the value of the notional income has been increased. It was nobody's case that the deceased was not working at all. His wife has entered in the witness box and had asserted that the earned Rs. 140/- per day. Even if we ignore the exaggeration, the figure arrived at by the High Court at Rs. 100/- per day and Rs. 3,000/- per month appears to be correct. However, considering that the claimant would get only 6% interest, we would chose to grant the multiplier of 14 instead of 12. Accordingly the notional income as applied would be Rs. $24,000 \times 14 =$ Rs. 3,36,000/- and to this will be added the other compensation like Rs. 2,000/- as funeral expenses, Rs. 5,000/- for the loss of consortium to the widow and Rs. 2,000/- for the loss of estate. The claimants would, therefore, be entitled to a sum of Rs. 3,45,000/-. The said sum shall

carry the interest at the rate of 6% per annum from the date of claim petition.”

10. Therefore, it is submitted that the action of the learned Tribunal in holding the monthly income at Rs.2,000/- (Rs. Two Thousand) per month during the relevant point of time is not based on record and contrary to the decision of the Hon'ble Apex Court. It is also submitted that since because of the accident the Claimant sustained injury that too amputation of his right leg near knee and due to such injury he became unable to continue with his business, learned Tribunal did not award any compensation towards future prospect in terms of the decision rendered by the Hon'ble Apex Court in the case of ***Smt. Sarala Verma and Ors. Vs. Delhi Transport Corporation and Another.***

11. Hon'ble Apex Court in the case of ***Smt. Sarla Verma 2009 (2) TAC 677 (SC)*** in Para 11 has held as follows:-

“11. In Susamma Thomas, this Court increased the income by nearly 100%, in Sarla Dixit, the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. Where the annual income is in the taxable range, the words 'actual salary' should be read as 'actual salary less tax'. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different

yardsticks being applied or different methods of calculation being adopted. Where the deceased was self implode or was on a fixed salary (without provision for annual increments etc.), the Court will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.”

12. It is also submitted that relying on the Constitution Bench decision of the Hon’ble Apex Court in the case of ***National Insurance Company Ltd. Vrs. Pranoy Sethi***, Hon’ble Apex Court in Para 10 of the Judgment in the case of ***Jagdish Vrs. Mohan & Ors. (2018 (2) TAC 14 (SC))*** has held as follows:

“10 In the judgment of the Constitution Bench in Pranay Sethi (supra), this Court has held that the benefit of future prospects should not be confined only to those who have a permanent job and would extend to self-employed individuals. In the case of a self-employed person, an addition of 40 per cent of the established income should be made where the age of the victim at the time of the accident was below 40 years. Hence, in the present case, the appellant would be entitled to an enhancement of Rs. 2400/- towards loss of future prospects.”

13. It is also submitted that even though as per Part II of Schedule I of the Employee’s Compensation Act, 1923 the permanent disability due to such amputation of the right leg would be at 50%, but since due to such injury the Claimant became permanently disable to run his business, the said disability should be taken at 100% or at best 75%. It is also submitted that taking into account the age of the injured at the relevant point of time the multiplier 14 should have been applied.

14. Mr. Panigrahi further submitted that even though learned Tribunal after going through the materials placed before it, came to a finding that the accident occurred due the rash and negligent driving of the driver of the offending vehicle bearing Registration No. OR-09-C-6476, which was duly insured with the Company of Respondent No. 3-Insurer, but learned Tribunal without any reason or basis and relying on the police papers apportioned the liability at the rate of 50:50 in between the Insurer-Company and the Owner of the other vehicle i.e. OR-M-5155 represented by the Respondent No. 2 in MACA No.1173 of 2007. It is submitted that in view of the decision of this Court reported in **1994 ACJ P-1301**, in a claim proceeding contents of charge sheet cannot be treated as evidence and Tribunal must rely upon the evidence led before it. This Court in the said reported case in Para 6 held as follows:-

“6. In view of the rival submissions of the parties, the first question that arises for consideration is whether the Tribunal was justified in holding that the deceased was travelling on the offending truck as a passenger and succumbed to the injury on account of the accident of the truck in question. The sole basis for the Tribunal to come to the aforesaid conclusion is the contents of a charge-sheet filed in the criminal case. The contents of a charge-sheet cannot possibly be treated as an evidence in the claim proceedings. The Tribunal obviously committed gross error of law in relying upon the said charge-sheet to come to the conclusion that the deceased was travelling on the truck as a passenger, On the other hand, the positive evidence of the claimants that the deceased was a pedestrian and the truck came and knocked him down has not been impeached in any manner by way of cross-examination. There was no justification on the part of the Tribunal to ignore that evidence of the claimants. In the

aforesaid premises, the finding of the Tribunal that the deceased was travelling on the truck cannot be sustained and the said finding is accordingly set aside. On the evidence on record, it must be held that the deceased was a pedestrian and while going on the road, the offending truck came and knocked him down.”

15. Making all such submissions, Mr. Panigrahi, learned counsel for the Claimant submitted that not only the compensation amount is required to be enhanced substantially, but also the entire compensation amount should be paid by the Company-Insurer instead of apportionment @ 50:50 in between the Company-Insurer and the Owner of the other vehicles.

16. Mr. Sinha along with Mr. Swain, learned counsels appearing for the Company-Insurer on the other hand submitted that since the accident occurred due to the head on collision in between the two vehicles bearing Registration No. OR-09-C-6476 and OR-M-5155 learned Tribunal taking into account the investigation conducted and charge sheet submitted by the local police vide Ext. 1 & 2 rightly saddled the liability @ 50:50 in between the Company and the Owner of the other Vehicle bearing Registration No. OR-M-5155. In support of the said submission Mr. Sinha and Mr. Swain relied on a decision of the Hon'ble Apex Court reported in **2007 AIR SCW 3591** as well as another decision reported in **2009 AIR SCW 992**.

17. It is also submitted by learned counsels appearing for the Company-Insurer that since no documentary evidence was filed and exhibited by the Claimant in support of his monthly income, the monthly income of the Claimant should have been assessed as

per the prevailing minimum wages prescribed for unskilled labourer, but learned Tribunal illegally assessed the said income at Rs.2,000/- (Rs. Two Thousand) per month.

18. Making all such submission, learned counsels appearing for the Insurer-Company submitted that no illegality has been committed by the learned Tribunal in apportioning the liability @ 50:50 in between the Company and the Owner of the other vehicle, but also the compensation amount needs reduction by this Court. Even though Respondent No. 1, the Owner of the offending vehicle No.0R-09-C-6476 appeared in MACA No. 1173 of 2007, but nobody was there on behalf of the said Owner, when the matter was heard by this Court.

19. Heard learned counsel appearing for the Parties. Perused the materials available on record. This Court after going through the same finds that save and except the evidence laid by the Claimant as P.W. 1 and the documents exhibited by him vide Ext.1 to Ext.16, no evidence was laid either orally or documentary by the Company-Insurer. Therefore, in absence of any contrary evidence laid by the Company-Insurer, learned Tribunal should not have assessed the monthly income of the Claimant at Rs.2,000/- (Rs. Two Thousand) per month.

20. In view of the decision relied on by Mr. Panigrahy, learned counsel appearing for the Claimant, the monthly income of the Claimant should have been assessed on notional basis i.e. at Rs.3,000/- (Rs. Three Thousand) per month instead of assessing the same at Rs.2,000/- (Rs. Two Thousand) without any reasons or basis.

21. Similarly this Court finds that due to the injury since the Claimant's right leg was amputated and the Claimant became unable to continue with his business, compensation towards future prospect should have been assessed at 30%. But learned Tribunal never allowed any compensation towards future prospect as revealed from the impugned Judgment. This Court also finds that even though the learned Tribunal in Para 8 of the Judgment came to a clear finding that the accident occurred due to the rash and negligent driving of the offending vehicle insured with the Company-Insurer, the liability in its entirety should have been fixed on the Insurer-Company instead of apportioning the same in between the Company and the Owner of the other vehicle. The decision relied on by the learned counsels appearing for the Company-Insurer are not applicable to the facts of the case as no evidence whatsoever was led by the Company before the Tribunal.

22. In view of the analysis made hereinabove and taking into account the fact that the accident had taken place in the year 2003, this Court instead of remanding the matter for fresh adjudication thinks it just and proper to enhance the compensation to Rs.3,00,000/- (Rs. Three Lakhs) consolidated. Since it is submitted that the Company-Insurer has paid its share of Rs.95,340/- (Rs. Ninety five thousand three hundred forty), this Court directs the Company-Insurer to pay the balance amount of Rs.2,04,660/- (Rs. Two lakh four thousand six hundred sixty) to the Claimant within a period of eight (8) weeks from the date of receipt of this Order.

21. It is observed that if the Company-Insurer fails to pay the balance amount as indicated hereinabove within the time

stipulated by this Court, the said balance amount shall carry interest @ 6% per annum for the period starting from the expiry of period of eight (8) weeks till its payment. It is further observed that only after payment of the balance amount in favour of the Claimant as directed by this Court, the Company will be permitted to take refund of the statutory deposit along with accrued interest from the Registry of this Court as deposited in MACA No.145 of 2008.

22. Both the appeals are disposed of with the aforesaid observation and directions.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
The 19th September, 2022/Sneha

