Ct. 551
Item No.07
01.08.2023
(**Suvendu**)

FMA 236 of 2010

Arup Bag
Vs.
The New India Assurance Company Ltd. and Anr.

Mr. Krishanu Banik
Mr. Tathagata Banik
Ms. Jaita Ghosh
...for the petitioner

Mr. Animesh Das
........for the respondent

The instant appeal is preferred against the judgment and award dated 22nd April, 2009 passed by the learned 3rd Motor Accident Claims' Tribunal, Howrah in M.A.C. Case No. 498 of 2003.

The appellant/ claimant sustained a road traffic accident on 15th April, 2003. He suffered injury and became disable for which he preferred an application before the learned Tribunal under Section 166 of the M.V.Act. Prior to filing of such application, he also filed another application under Section 140 of the M.V.Act wherein Rs. 25,000/- was awarded by the Tribunal in his favour.

The Insurance Company contested the matter before the learned Tribunal by filing written statement. The claimant himself appeared before the learned Tribunal as PW 1. One eye-witness was appeared as PW 2. Some documents including the Disability Certificate was produced and exhibited by the learned Tribunal. The Insurance Company adduced no evidence. After hearing the parties, learned Tribunal has passed the impugned award. By allowing the application of the claimant, learned Tribunal has assessed the compensation to the tune of Rs. 15,000/- towards the medical treatment and Rs. 10,000/- towards pain and sufferings, which is in total Rs. 25,000/-. It was further ordered that as the claimant had already received a sum of Rs. 25,000/- in an earlier proceeding under Section 140 of the M.V. Act, only interest part @ 8% per annum from the date of filing of the application has to be paid by the Insurance Company. The direction of the Tribunal was complied with by the Insurance Company and the Insurance Company deposited a cheque of Rs. 3,950/- before the learned Tribunal and the same was received by the claimant/appellant.

The appellant is before this Court with the grounds that the impugned award passed by the learned Tribunal is baseless and erroneous. Learned advocate appearing for the appellant/claimant submits that the learned Tribunal has not considered the facts and circumstances of the instant case and the compensation awarded by the learned Tribunal is not just and proper. He argues that the learned Tribunal has disbelieved the Disability Certificate issued by the Doctor of Howrah Hospital. Exhibit 6 is shown to this Court. He submits that in the said exhibit 50% disability of the appellant was mentioned but the learned Tribunal has not believed the same at all. He further submits that the learned Tribunal has not assessed any amount of compensation towards the non-pecuniary damages. He cites a decision of the Hon'ble Supreme Court wherein the Hon'ble Supreme Court has specifically observed the principle of non-pecuniary damages. He also submits that in the instant case, the monthly income of the claimant can be assessed as Rs. 3000/- and he is entitled to get the compensation according to Structure Formula opined by the Hon'ble Supereme Court in **Sarala Verma** and **Pranay Shetty**.

Learned advocate appearing for the Insurance Company raised objection to the submissions made by the learned advocate of the claimant and points out the examination of PW 1 before the learned Tribunal wherein he admitted that no operation or plastering was done on his person after the accident. Only the injury was managed by putting bandage. He again submits that exhibit 6/ Disability Certificate issued by the Doctor of Howrah Hospital is not beyond doubt. Only bandage was used for management but in that score how 50% disablement can be assessed by the Doctor. He also cites observations of the learned Tribunal on that score wherein the learned Tribunal is of opinion that the Doctor was not examined and was also not allowed to be cross-examined by the Insurance Company and thus, the 50% disability of the claimant is not believable. In support of his contention, he cites relevant provisions of Sections 60, 100 and 104 of the Indian Evidence Act. He also cites one decision of the Hon'ble Supreme Court reported in (2001) 3 SCC 208 in respect of burden of proof under Sections 101 and 102 of the Evidence Act. He also cites a decision of Allahabad High Court reported in AIR 1989 Allahabad 133 in support of the admissibility of the expert evidence and a decision reported in AIR 1985 NOC 132 (Punj. & Har.) in respect of necessity of Local Commissioner appearing in witness box for proving his report.

Heard learned advocates and perused the materials on record.

Learned advocate for the Insurance Company places reliance upon the specific proof of a document. It is the contention of the learned advocate for the Insurance Company that the Exhibit 6, this is the Disability Certificate, was not specifically proved before the learned Tribunal and thus, the learned Tribunal has rightfully disbelieved the said Disability Certificate.

By virtue of Section 60 of the Evidence Act, it is the cardinal principle of law that the evidence should be direct, that is, if one person has seen a fact that should be the evidence of that person. In that score he points out the opinion portion of Section 60 of the Evidence Act. It relates to the ground on which the opinion is held by a particular person. It is the dictum of Section 60 that when opinion of a person is the fact in issue then the person who formed the opinion must appeared before the Court to prove that it is the opinion of that person.

Regarding the burden of proof, Sections 101 and 104 of the Indian Evidence Act provides that when the burden appears initially upon the plaintiff or the prosecution and when the burden can be shifted and how the burden is lies upon the person who wants to prove a fact before the Court of law. It is true that specific rule of law to prove a fact is not applicable in cases under the Motor Vehicles Act. The procedure of the M.V.Act before the learned Tribunal is summary in nature.

Then also, if I concentrate upon the submissions of the learned advocate for the Insurance Company, it is to be noted that Section 35 of the Indian Evidence Act makes it clear regarding relevancy of entry in public record made in performance of any official duty. So it is the relevant fact which must noticed by a court of law that when a person is acting in his official duty and made any comment or opinion upon the public document where by law he is duty bound to make such comment and made entry in the public record, that entry and comment is a relevant fact and reliable before the Court of law. In such analogy, the exhibit 6 which originally appears in the LCR, issued by the Board of Doctors of Howrah Hospital, contains original signatures and also contains the seal of the relevant hospital.

Initially burden is upon the claimant to prove the document and the claimant has produced the original document before the learned Tribunal and this appears to be a primary evidence which produced in original. On producing such primary evidence, the law to prove such document that is the initial burden upon claimant under Section 101 of the Evidence Act, had specifically complied with by the claimant. Thereafter the burden shifted upon the Insurance Company to contradict the same document (Exhibit 6); but it appears from the materials on record and the LCR that Insurance company has not raise any objection at the time of exhibiting the document or that, the Insurance Company has not called any doctor or any staff of the Howrah Hospital to contradict the evidentiary value of Exhibit 6. Considering the entire aspect of the matter, in my view, the submissions of the Insurance Company regarding non-admissibility of the Disability Certificate is appears to be not good proposition of law.

After considering the other materials in hand, it appears to be that the learned Tribunal surprisingly has allowed all the issues in favour of the claimant but as the exhibit 6 was doubtful before the Tribunal so the structure formula as per the judgment of the Hon'ble Supreme Court in **Sarala Verma** and **Pranay Shetty** was not applied and only a lumpsum amount of Rs. 15000/- towards the medical treatment and Rs. 10,000/- towards the pain and sufferings was awarded.

Exhibit 6 shows that the claimant suffered from “painful ROM(L) shoulder due to RTA” and his disability was assessed as 50%. It appears that the Certificate was issued on 17.04.2004, i.e. after one year of the accident and then also the claimant was suffering pain in the shoulder.

It appears from Discharge Certificate (Exhibit 7), the Clavicle (L) bone of the appellant was fractured due to such accident. It is true that no operation is possible when the clavicle bone was fractured and it can only be managed by bandage. It heals automatically, sometime discomfort persists for lifelong if not managed properly.

The Hon’ble Supreme Court in Jagdish Vs. Mohan has specifically guided that the physical disability of any person cannot be equated with the functional disability to assess the compensation. In this case, claimant stated his occupation as business wherein he used to earn Rs. 4000/- per month at the time accident. Neither document of business was exhibited nor any evidence was adduced regarding the nature of his business. It is true that the patient is suffering from some pain in shoulder which must have loosen earning capacity of the claimant.

Considering the same in the instant case, the disability is assessed to be 20%.

Considering the entire facts and circumstances of the case and considering the relevant provisions of law, at appears to me that the learned Tribunal has committed error for not awarding compensation according to structure formula guided by the Hon'ble Supreme Court. Thus, it is necessary to recast the award of compensation by modifying the judgment and order passed by the learned Tribunal.

The alleged accident happened in the year 2003. It is the general practice of this Court when the accident happened before 2010, in absence of any reliable document regarding proof of income of the claimant, the monthly income is adopted as Rs. 3000/- per month. Thus, in this case to ascertain the just and proper compensation, monthly income of the complainant would be assessed as Rs. 3000/- and accordingly, the yearly income would be Rs. 36,000/ (Rs. 3000/- x 12).

The claimant is also entitled to future prospects to the tune of 40% of the income according to the directions of the Hon'ble Supreme Court passed in **Pranay Shetty** which is Rs. 14,400/-. Thus, total yearly income comes to Rs. 50,400/-. 20% of the said amount comes to Rs.

Rs. 10,080. The applicable multiplier in this case is 15 considering the age of the claimant to be 38 years at the time of accident. After multiplying the multiplier, the compensation comes to Rs. 1, 51,200/-. The claimant is also entitled to get non-pecuniary damages to the tune of Rs. 50,000/-. Thus, the total compensation comes to Rs. 2,01,200/-. The claimant has already received Rs. 28,950/-. So the balance amount comes to Rs. 1,72,250/-.

The Insurance Company is directed to pay the balance amount of compensation along with 6% interest per annum from the date of filling of the claim application. The Insurance Company is further directed to deposit the amount of compensation within eight weeks from the date of passing of this order with the office of the learned Registrar General, High Court Calcutta. On such deposit, the appellant/claimant is at liberty to receive the same subject to ascertainment of payment of requisite court fees.

FMA 236 of 2010 is disposed of in terms of the above.

Connected application, if any, is also disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties on usual undertakings.

(**Subhendu Samanta, J.**)