IN THE HIGH COURT AT CALUTTA
Civil Appellate Jurisdiction

08.08.2023
SL No.11 & 12
Court No. 551
Ali

FMA 1088 of 2010
IA No:CAN/1/2010 (Old No:CAN/5958/2010)
CAN/2/2023, CAN/3/2023)

New India Assurance Co. Ltd.
Vs.
Sri Sandip Prasad & Anr.

With
COT 67 of 2022

Sandip Prasad & Anr.
Vs.
New India Assurance Co. Ltd.

Ms. Gopa Das Mukherjee
…………… for the appellant-insurance Co. in FMA 1088 of 2010 and respondent No. 1 in COT 67 of 2022.

Mr. Krishanu Banik
…for the respondents in FMA 1088 of 2010 and appellants in COT 67 of 2022.

The instant appeal is preferred against the judgment and order dated 28th April, 2010 passed by learned Judge, Motor Accident Claims Tribunal, Fast Track 1st Court, Howrah in M.A.C. Case no. 224 of 2006 under Section 166 of the M.V.Act.

The brief facts of the case is that the claimant i.e. the present respondent No. 1 has preferred a claim application before the learned tribunal for getting compensation on the ground that she suffered permanent disability due to a road traffic accident. The insurance company has contested the case before the learned tribunal.

Evidences were adduced by both the claimants and the insurance company before the learned tribunal.

Learned tribunal after hearing both the parties and after perusing the evidences on record passed the impugned award by allowing the compensation to the claimant amount to Rs. 2,03,900/- only and directed the insurance company to pay the compensation.

The insurance company has preferred this appeal against the said award. The two grounds are raised by the insurance company before this appellate court. Firstly; the driver of the offending vehicle had no valid driving licence to drive the offending vehicle at the time of alleged accident thus there was a breach of policy of the insurance certificate by the owner, consequently the owner is liable to pay the compensation instead of the insurance company. Secondly; the disability certificate issued by the Doctor in favour of the claimant is not a good document and the Doctor had no specific qualification to issue the disability certificate. The disability of the claimant as certified by the Doctor (65%) and adopted by the learned tribunal is not correct.

One cross objection was filed by the claimant against the said appeal after much delay and two applications being CAN 2 of 2023 and 3 of 2023 are filed for condonation of delay and an application for filling additional documentary evidences under Order 41 Rule 27 of the Code of Civil Procedure respectively.

Learned advocate for the appellant submitted before this court that the driver of the offending vehicle was possessed a driving licence which is “light motor vehicle non transport” in nature. The offending vehicle was a truck (Tata 407). The truck is obviously a transport vehicle thus the driver who process a non transport light cannot ply the vehicle which transport the goods. She submitted before this court that the driving licence particulars were produced on behalf of the insurance company by virtue of evidence of OPW 2. The said document was marked as Exhibit-E. The document was one information issued by the Transport Department L.A. Beltala Road, Kolkata-20. The document contained the specific seal of the said Government Department thus on perusing such document, it is proved that the owner has violated the terms of the policy thus in this case the insurance company is not liable to pay the compensation.

The learned advocate appearing on behalf of the respondents submitted that the document marked as Exhibit-E was not specifically proved before the learned tribunal. That is why; the learned tribunal has not taken cognizance of the document.

The contained of the document was not proved according to the Evidence Act thus the value of the documentary evidence of the Exhibit-E cannot be assessed by this appellate court.

In considering the paper book it appears that the Exhibit-E was not annexed that this paper book; from the LCR, I peruse the Exhibit-E which appears to me an information slip issued by the concerned Government Department which contained the specific seal of the Government office. On perusing the evidence of OPW-2 who stated before the learned tribunal that he collected the documents from the concerned M.V. Office. The document was marked without objection. Considering the same, it appears to me that Exhibit-E is an information slip of Government records, the same car very well be accepted as secondary evidence when the content of which was not challenged by claimant. The contents of the document shows the driver possessed the driving licence which is in the nature of “light motor vehicle non transport”. Obviously, the offending vehicle is a transport vehicle so the owner must has violated the terms of the policy. In that score, the insurance company is not liable to pay the compensation. However, by virtue of the decision of the Hon’ble Apex Court passed in ***Swaran Singh and Challa Bharathamma***. The insurance company though may have not liable to pay the compensation but they are directed to pay the compensation in this case and they are at liberty to recover the same from the owner of the offending vehicle.

In considering the next point regarding the disability certificate which was marked as Exhibit-4, it appears that the disability certificate was issued by one Dr. P. Bhattacharya. The examination was done on 18th December, 2009, alleged date of accident was on 7th March, 2006, and the said Dr. appeared before the learned tribunal and exhibited the certificate. The certificate contained that the claimant suffered disability to the extent of 65%. The learned tribunal has also assessed the compensation on the basis of the said observation of the Doctor. Learned advocate for the insurance company submitted, for the purpose of allowing the compensation of a particular case, the functional disability has to be assessed in all times. The physical disability cannot be equated with the functional disability. On the basis of this situation, he cited a decision of ***Raj Kumar Versus Ajay Kumar & Another*** the guidelines of Hon'ble Supreme Court was specifically mentioned in paragraph 19 of the said citation:

(i) All injuries (or permanent disability 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 entirely.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

On the other hand, the learned advocate for the claimant has cited decisions of this Hon'ble Court and also of Hon'ble Orissa High Court passed in ***Ratan Mali Vs. New India Assurance Co. Ltd, The Oriental Fire and General Insurance Co. Ltd. Vs. Khudiram Dutt And Anr.*** and ***Oriental Insruance Co. Ltd. Vs. Sakti Kumar Mohanty and Anr.*** He submitted before this court that the opinion of Dr. by issuing the certificate is the guiding principle to assess the compensation.

Heard the learned advocates perused the judgment laws. It appears to me by virtue of the guidelines of the Hon'ble Apex Court in ***Raj Kumar Versus Ajay Kumar & Another,*** it is true that a person can sustained injury of his body and the injury is required to be dealt with the profession and the occupation of the claimant. The functional disability regarding carry out of the occupation of the claimant is to be assessed for giving compensation of each and every case. In this case, the claimant has stated his occupation to be "service" and facts suggests he is a labour. The physical disability certificate shows that he is suffering discomfort at the right shoulder and also suffering stiffness in the right shoulder. It appears to me that the other part of the body of the claimant is functioning properly only the shoulder may have the difficulty though it is not such difficulty which can affect the day-to-day life. However, considering the nature of work usually done by the present claimant, I think it necessary that the functional disability of the claimant in this case would be 50%.

The cross appeal was filed in long delay only for the purpose of getting compensation towards the future prospects according to the direction of the Hon'ble Supreme Court in ***Pranay Sethi*** and for getting more compensation towards the non pecuniary damages. It appears to me that the alleged accident was happened in the year 2006. Now we have passed more than 15 years and the claimant is not getting the compensation however for the purpose of beneficial legislation of this Act. I think it necessary that the claimant is entitled to get the compensation towards the future prospect in this case according to the direction of the Hon'ble Apex Court in ***Pranay Sethi.*** It further appears that the amount of Rs. 5,000/- was awarded towards the cost of pain and suffering of the present claimant. The claimant is entitled to get Rs. 15,000/- towards the pain and suffering of the future discomfort under heading of non pecuniary damages.

Consequently, the COT alongwith CAN applications are disposed of without and specific order.

Thus after considering all the heads the award passed by the learned tribunal is required to be modified. The just and proper compensation is hereby assessed as follow:-

Monthly income comes to Rs. 1,500/-, yearly income comes to Rs.18,000/-. The applicable multiplier of this case should be 18 according to the direction of the Hon'ble Apex Court in ***Sarla Verma and Pranay Sethi*** so the award comes to Rs. 3,24,000/-. 40% of future prospect is added with him Rs. 1,29,600/- after adding the future prospect the award comes to Rs. 4,53,600/-, 50% loss of income calculated as Rs.2,26,800/-. The claimant is also entitled the non pecuniary damages Rs. 15,000/- after adding all the heads the award comes to Rs. 2,41,800/-.

The claimant is entitled to get the compensation as mentioned above alongwith interest @ 6% per annum from the date of filing of the claim application i.e. from 28.06.2006. It appears that the insurance company had already deposited the award which must carry sum interest. The office of the learned Registrar General, High Court, Calcutta is directed to calculate the award with the accrued interest and disburse the same to the claimant. If it appears after calculation that there are sum amount due from the insurance company, the insurance company shall pay the same within four weeks of due information and if it appears that the accrued interest alongwith with principal is appears more than the calculated compensation that the excess deposited amount to be refunded to the insurance company.

After such payment being made, the insurance company is at liberty to recover the amount from the owner of the offending vehicle according to the direction of Hon'ble Apex Court passed in ***Challa Bharathamma.***

The instant FMA alongwith COT 67 of 2022 are disposed of.

All connected applications, if any, stand disposed of.

Interim orders, if any, stand vacated.

Parties to act upon the server copy and urgent certified copy of this order be provided on usual terms and conditions.

(Subhendu Samanta, J.)