(2014) 04 CAL CK 0058

Calcutta High Court

Case No: F.M.A. No. 598 of 2010

Dipali Sen		APPELLANT
	Vs	
National Insurance Company Ltd.		RESPONDENT

Date of Decision: April 25, 2014

Acts Referred:

- Motor Vehicles Act, 1988 - Section 166

Citation: (2014) 4 WBLR 928

Hon'ble Judges: Sahidullah Munshi, J; Indira Banerjee, J

Bench: Division Bench

Advocate: Krishanu Banik, Advocate for the Appellant; Rajesh Singh, Advocate for the Respondent

Judgement

Sahidullah Munshi, J.

The instant appeal arises out of the judgment and award dated 23rd July, 2009 passed by the learned Judge, Motor Accident Claims Tribunal, 2nd Court, Burdwan in MAC No. 21 of 2009. The appellants were the claimants before the Tribunal. They are the widow, sons and daughters of the deceased Subal Chandra Sen, a man of 63 years old claimed to be an employee at the date of his death and was earning Rs. 4,500/- (Four Thousand Five Hundred) only per month. The claim application was filed by the above named persons under Section 166 of the Motor Vehicles Act before the Claims Tribunal praying for just compensation estimated to be Rs. 2,88,000/- (Two Lakh Eighty Eight Thousand) only. In the claim application the appellants-claimants stated that victim Subal Chandra Sen, hereinafter referred to as the "deceased" who died in a motor accident on 26th February, 2004 caused by the offending vehicle bearing Registration No. WB-42F/1096 (Tata Sumo) covered by valid insurance policy with National Insurance Co. Ltd., the respondent No. 1, hereinafter referred to as the "insurer". The respondent No. 2 is the owner of the offending vehicle being No. WB-42F/1096 (Tata Sumo), hereinafter referred to as the "offending vehicle". The claim application was contested by the Insurer by filing written

statement. In its written statement the Insurer denied and disputed the pleadings made in the claim application and it has specifically denied that the victim was an employee of the alleged private company and that he was much above 70 years of age on the date of accident and further that he had no stable income at such age. In order to prove their case the claimants produced three witnesses e.g.-i) Dipali Sen, widow of the deceased as P.W. 1, ii) Pradip Kumar Das, P.W. 2, an eye witness to the accident and iii) Imtiaz Khan, P.W. 3.

2. On perusal of the evidence-on-record, the learned Judge of the Tribunal held:

a) That the offending vehicle Tata Sumo was duly insured with the respondent No. 1 and Subal Chandra Sen died in a motor accident caused by the Tata Sumo due to its rash and negligent driving by its driver;

b) That according to post mortem report, the victim was 63 years of age and the multiplier 5 should be adopted.

3. After perusal of the evidence the Tribunal disbelieved the income of the victim Subal Chandra Sen and it held that the victim was only entitled to have a notional income of Rs. 15,000/- (Fifteen Thousand) only per annum. The Tribunal held that victim was entitled to a compensation for Rs. 54,500/- (Fifty Four Thousand Five Hundred) only inclusive of Rs. 4,500/- (Four Thousand Five Hundred) only, towards loss of estate and funeral expenses and further that the claimants were entitled to an interest @ 7% per annum on the said amount from the date of filing the claim petition till payment of the award except the period from 2nd September, 2006 to 2nd February, 2009 when the MAC Tribunal was lying vacant. In computation of the income, the Tribunal held it to be Rs. 15,000/- (Fifteen Thousand) only per annum. It held that 1/3rd from the said income should be deducted for personal and living expenses. And, according to the age group of 60 to 65 years it has used multiplier 5 as per the 2nd Schedule of the Motor Vehicles Act, 1988. Thus, the Tribunal has awarded a total compensation of Rs. 54,500/- (Fifty Four Thousand Five Hundred) only.

4. In this appeal, the said award is under challenge. Learned advocate for the appellant fairly submits that he has taken several grounds in the Memorandum of appeal but he challenges the impugned award only on two counts, namely,

i) The Tribunal, while computing the monthly income, has committed an error in holding a notional income for the deceased while it was a case made out by the claimants that he was an earning person and the Tribunal has converted an earning person to a non-earning one and, therefore, the award should be modified by making a fresh computation of income taking into account of the monthly income earned by the deceased.

ii) The appellant has claimed that the Tribunal has also committed an error in applying multiplier 5 instead 7 which multiplier has been re-scheduled in the judgment passed by

the Hon"ble Supreme Court in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, and which has been affirmed by subsequent judgments of larger Bench of the Apex Court.

5. In support of the above contention that the multiplier should be 7 according to the judgment of Sarla Verma & Ors. v. Delhi Transport Corporation & Anr. (supra), the learned advocate for the appellants has relied on another judgment in the case of Reshma Kumari and Others Vs. Madan Mohan and Another, to show that Sarla Verma report has been confirmed by the subsequent 3-Judges Bench decision of the Hon"ble Apex Court.

6. In support of the appellants" case on the income issue, Mr. Banik, learned advocate, submits that the Tribunal has committed an error in not accepting the income of the deceased as per the evidence of P.W. 3 who deposed in his Examination-in-Chief that "I knew Subal Chandra Sen. He used to work as manager under Sheo Narayan Jaiswal Pvt. Ltd. I am a "mistry" of the said company. Subal used to earn Rs. 4,000/- to Rs. 5,000/- per month."

7. One paper is shown to the witness--the witness says that "I do not know English and I cannot say what is written in this paper." In his cross-examination, P.W. 3 stated:

"I have received summons. Not a fact that I have not given any authorized letter to depose in this case. Not a fact that I am not a "mistry" of the aforesaid company or that Subal Chandra Sen was not the manager of that company or that he was not known to me or that Subal did not receive Rs. 4,000/- to Rs. 5,000/- per month as manager or that he was not the manager of the said company. Or that I have stated in my Affidavit-in-Chief are not correct."

8. Mr. Banik has drawn our attention that in order to prove the income of the deceased to the extent of Rs. 4,000/- to Rs. 5,000/- per month, his client produced a salary certificate and, therefore, the Tribunal ought to have accepted that deceased had an income in between Rs. 4,000/- and Rs. 5,000/- on the basis of the said certificate. The Tribunal did not accept the said document as none appeared to prove execution thereof. Mr. Banik has submitted that apart from the evidence of P.W. 3 the claimant Dipali Sen also deposed for herself and on behalf of other claimants and she asserted that her husband used to earn Rs. 4,500/- (Four Thousand Five Hundred) only per month.

9. In her cross-examination by the Insurance Company, she also stated that her husband died in a motor accident and that he was an employee of Sheo Narayan Jaiswal Pvt. Co. Ltd. earning Rs. 4,500/- (Four Thousand Five Hundred) only per month towards his salary. Mr. Banik further submits that the Tribunal ought to have adopted multiplier 7 as per the reported judgment in Sarla Verma"s (supra) case instead of multiplier 5 as has been wrongly applied by the Tribunal.

10. Mr. Singh appearing for the Insurer, supported the award passed by the Tribunal and in support of his client submitted that inasmuch as the claimants failed to prove their income by any cogent evidence, the learned Tribunal rightly adopted the notional income provision for a sum of Rs. 15,000/- (Fifteen Thousand) per annum and that the victim was never an earning person. Mr. Singh submits that having regard to the age group of the deceased the Tribunal has committed no error in applying multiplier 5. According to Mr. Singh, there is no error in the award passed by the Tribunal either in the computation of the income or as regards selection of multiplier.

11. In order to establish his contention Mr. Singh has placed reliance on the judgment reported in the case of Raj Kumar Vs. Ajay Kumar and Another, to convince the Court that Tribunal can itself verify whether a particular document issued by the authority is genuine or not, however, that judgment has got no application in the facts and circumstances of the case at hand. Mr. Singh relying on another judgment reported in U.P. State Road Transport Corporation & Ors. v. Trilok Chandra & Ors. and draws the attention of the Court that selection of multiplier should be based on the 2nd Schedule and not otherwise. The third judgment Mr. Singh relies on the issue of evidence, that is, Sudhir Bhuiya Vs. National Insurance Co. Ltd. and Another, .

12. We have heard the respective submissions made by the learned advocates on behalf of Appellants and the Insurer. We have perused the materials-on-record and the evidence adduced on behalf of the claimants. So far the income issue, as argued by Mr. Banik on behalf of the claimants, we have perused the income certificate field by the claimants in the Tribunal and we have also considered the evidence of the P.W. 3. Although, the claimants rely on the income certificate but he never called anyone to prove execution of the said document. P.W. 3, who claims to be a "mistry", was called on in the witness box and deposed that Subal used to earn Rs. 4,000/- to 5,000/-. P.W. 3 never said that he saw the person executing the document nor did he say that he knows his signature nor did he say that as a "mistry" he had any knowledge, general or special that such letters are being issued by the management/employer to its employees/workmen. Therefore, without the signature on the salary certificate being proved and P.W. 3"s deposition having not been corroborated by any other available evidence, it is difficult for us to reasonably believe that the income certificate as filed by the petitioner could be treated to be a piece of evidence in support of income of the deceased. The judgment in the case of Sudhir Bhuiya v. National Insurance Co. Ltd. & Anr. (supra) placed before us is pat on the point and the ratio decided in the said judgment goes against the claimants. The said judgment says that unless the author of a document deposes before Court and faces cross-examination, contents thereof, are worst pieces of hearsay evidence. Paragraph 12 from the said judgment may be quoted for the present issue.

"Para-12. It is now settled position of law that by merely proving the hand-writing of the person who has written a document, the veracity of the statement made in the said document cannot be proved. Such person must depose before Court in support of the contents and will face cross-examination of the opponent; otherwise such document can

be merely taken into consideration for the purpose of showing that such a certificate was issued, once its genuineness is proved. But whether the contents of the certificate are correct or not, such facts cannot go into the evidence unless the author of the document deposes before Court and faces cross-examination. The contents of a document without examining the author are worst pieces of hearsay evidence. [June alias Arjun Mandy v. State, reported in 90 CWN 838 at 847 (D.B.); Sris Chandra Nandy Vs. Sm. Annapurna Ray, ;]"

13. We, however, refrain ourselves from making any comment about the genuineness of the said document in this case. We only say that by producing the said document and relying thereon the claimants could not prove that the deceased was earning Rs. 4,000/- to 5,000/- at the date of accident. It was also argued by Mr. Banik that irrespective of the deposition made by P.W. 3, the deposition of P.W. 1 is already on record which asserts that the deceased was an earning person and that he used to earn Rs. 4,500/- per month. But, on a totality of the circumstances and the evidence of P.W. 1, P.W. 2 and P.W. 3 we cannot single out the evidence of P.W. 1 when it is the admitted fact that the claimants relied on the salary certificate to prove the income of the deceased and they failed to prove the same. As a consequence whereof, evidence of P.W. 1 with regard to income, cannot be considered to be at all an evidence proving the income of the deceased. So far the other point urged by Mr. Banik, the learned advocate appearing for the claimants that the Tribunal committed an error in applying multiplier 5 instead of 7 as indicated by the Supreme Court in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, and which has subsequently been confirmed in the case of Reshma Kumari and Others Vs. Madan Mohan and Another, . Their Lordships of the Apex Court held that in selection of multiplier column IV of the table formulated under paragraph 18 of Sarla Verm judgment should be followed. Having regard to such position of law and the decisions of the Apex Court as mentioned above we hold that the Tribunal has committed no error and/or illegality in holding that the deceased was a non-earning person and, therefore, in computation of the compensation the notional income of Rs. 15,000/- has been correctly taken into consideration. But the Tribunal"s decision to deduct 1/3rd from the said notional income is, however, without any basis. "Note" mentioned in the Second Schedule for deduction of 1/3rd from the compensation in respect of fatal accident cases considering the personal and living expenses which the victim would have incurred towards maintaining himself had he been alive, cannot be applicable in the present case having regard to the victim being a non-earning person.

14. We have carefully gone through the aforementioned Schedule which has got six different "heads", the first of which is for calculation of compensation using different multiplier for different age groups taking into account of the income slabs starting from Rs. 3,000/- (Three Thousand) only per year to Rs. 40,000/- (Forty Thousand) only per year. The note below the first "head" refers to deduction of 1/3rd from the compensation calculated as per the income and the use of multiplier indicated for the corresponding age groups and not otherwise. Therefore, there is no doubt in our mind that the Tribunal has

committed an error in deducting 1/3rd from the compensation in the case of a non-earning person. We strike down the said decision of Tribunal deducting 1/3rd from the assessed compensation. The other defence is which we find in the impugned award are that instead of multiplier 5 the Tribunal should have adopted multiplier 7 and the victim''s widow was entitled to a sum of Rs. 5,000/- (Five Thousand) only towards consortium, which the learned Tribunal failed to award. Accordingly, the impugned award is liable to be modified and the same stands modified as follows:

Notional income of the deceased = Rs. 15,000/- (Fifteen Thousand) only per annum. As multiplier 7 is to be adopted,

Loss of dependency = (15,000 X 7) = Rs. 1,05,000/- (One Lakh Five Thousand) only.

Add: i) Rs. 2,000/- (Two Thousand) only for funeral expenses.

ii) Rs. 2,500/- (Two Thousand Five Hundred) only for loss of estate.

iii) Rs. 5,000/- (Five Thousand) only as consortium for the widow. Total compensation = Rs. (1,05,000 + 4,500 + 5,000)/- = Rs. 1,14,500/- (One Lakh Fourteen Thousand Five Hundred) only.

15. The appeal is allowed in part.

16. There will be no Order as to costs. The insurer is directed to forthwith deposit the excess amount in the Claims Tribunal preferably within a period of four weeks together with interest @ 8% per annum from the date of filing claim petition till liquidation of the entire award.

Indira Banerjee, J.

I agree.