

HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 2891 OF 2007

New India Assurance Company Limited)
87, M. G. Road, Bombay - 23)
Policy No. 11100, valid till 7.10.1993)
To. 6.10.1994.) ... Appellant
(Orig. Opponents
No.2) - Insurers.

Versus

1. Manik Hulaji alias Khulaji Sonakamble	)	
Plot No. 11, S - 1 Baisanwadi,	)	
Shivaji Nagar, Bombay - 400043	)	
2. Mr. Augustion Anthony D'Souza,	)	
Asha Nagar, 17 Sunita Building,	)	
33, Opp. Glass Factory, Chembur,	)	
Bombay 400 089	)	... Respondents (Respdt. No. 1 is the orig. Applicant and Respdt. No. 2 is the orig. Opp. Party.)

Ms. Jyoti Bajpayee, Advocate for the Appellant.
Ms. Amrinkhan i/b Avinash Gokhale Advocate for Respondent No. 1.

CORAM : S. G. DIGE, J.

RESERVED ON : 15th DECEMBER, 2022.

PRONOUNCED ON : 13th JANUARY, 2023

JUDGMENT :

1. Being aggrieved and dissatisfied with the judgment and order passed by Motor Accidents Claims Tribunal, Mumbai. This appeal is preferred by Insurance Company/original respondent no.2 .

2. Brief facts of the case are as under.

On 1st February, 1994, respondent no. 1- original claimant (for short 'the Claimant') was proceeding from Gowandi station to Baiganwadi (Shivaji Nagar), in an Auto Rickshaw No. MH 03 E 1265. The Auto Rickshaw was being driven in a rash and negligent manner. The driver of Auto Rickshaw had overtaken another vehicle and thus lost control over his Auto Rickshaw and dashed against the Auto Rickshaw coming from opposite direction. As a result of the forceful dash, the claimant got injured and fell on the road. He was admitted in the hospital for treatment. He suffered multiple grievous injuries. The FIR was registered against the driver of Auto Rickshaw.

3. The claim petition was filed by the claimant for getting compensation before the Motor Accident Claims Tribunal, Mumbai

(for short 'the Tribunal'). The Tribunal has awarded compensation against the said judgment and order this appeal.

4. It is contention of learned counsel for appellant that the Tribunal has awarded exorbitant and excessive compensation of Rs. 5,02, 150/-. The Tribunal failed to consider that every disability does not result in loss of earning capacity. The Tribunal has considered monthly income of the claimant on higher side. The Disability Certificate of claimant is issued on higher side but, the Tribunal has not considered these facts and passed the impugned order. Hence, requested to allow the appeal.

5. It is contention of learned counsel for the respondents that, at the time of accident, the claimant was working as Mason Gowandi. He was earning Rs. 100/- per day. But, the Tribunal has considered his income Rs. 2,000/- per month. The claimant sustained grievous injuries in the accident, he was operated for the said injuries on two occasions. Dr. Puranik has given certificate of 87% permanent partial disability. Due to said accidental injuries, the claimant is unable to do any work. The Tribunal has considered all these aspects and has awarded compensation which is proper.

6. I have heard, both the learned counsel, perused judgment and order passed by the Tribunal. The issue in this appeal is compensation awarded to the claimant is on the higher side. To prove his case, the claimant has examined himself. He has stated that due to said accident, he was seriously injured. Initially on 01/02/1994, he was admitted in Hegde Hospital, Chembur. Thereafter, he was admitted in Diamond Polyclinic and Nursing Home, Chembur from 02/02/1994 to 03/03/1994 and second time he was admitted from 07/03/1994 to 13/03/1994. Thereafter, third time he was admitted from 28/12/1995 to 03/01/1996 and 08/10/2002 to 22/10/2002 for further treatment and operation. He has further stated that he was attending OPD treatment in Diamond Polyclinic and Nursing Home for about 12 months, he used to go once a week for OPD in Diamond Polyclinic and Nursing Home, Chembur. He used to go by taxi for which he spent Rs. 90/- per trip. He was advised to take special diet, he took special diet for a period of six months. He used to spend Rs. 65/- to 75/- per day for the special diet. At the time of accident, he was working as a Mason with Vaishali Construction Civil & Plumbing Contractors, Shivaji Nagar (Baiganwadi), Govandi. He was getting Rs. 100/- daily as Mason and from the date of

accident, he is unable to do the work because of accidental injury. He is unable to walk for long distance, he cannot run, cannot climb staircases as he is having flexion dormity right knee of 20 degree flexion Right knee of 90 degree further flexion to possible wasting Muscles. All these problems and infirmities has led to complete occupational disability. He consulted Dr. Satish Puranik, Orthopedic Surgeon for the assessment of his disability. He issued disability of 87%. This witness was extensively cross-examined by the learned counsel for appellant. Nothing elicited in his cross-examination to disbelieve the evidence of this witness.

7. In support of evidence of the claimant, the claimant has examined PW-3 Narsimhrao Kamble, owner of Vaishali Construction. This witness has stated that claimant was working as a Mason in his construction company. He used to pay daily Rs. 100/- to him, after the accident claimant is not working with him.

8. To prove the disability, Dr. Satish Puranik is examined at Exhibit "21". He has stated that the claimant was admitted in his hospital, he had developed Osteomyetlitis in the right fumur which has three existing fractures and fracture was of lower 1/3rd fumur the

location of the fracture was at the juncture of the middle and lower 1/3rd. The claimant had undergone surgery in the year 1994 and in the year 2002 for Osteomyelitis i.e. pus formation. The claimant had also approached this witness on 28 February, 2002 for the disability certificate. This witness examined the claimant clinically and radiologically. Due to complication developed in the right leg, the claimant had deformities. As per the opinion of this witness, the claimant had suffered 87% permanent partial disability. Accordingly, this witness issued a certificate. This witness has further stated that the claimant cannot do any work due the disability. In cross-examination, this witness admitted that the claimant should have been recovered within 3 to 6 weeks but, as pus formation took place, complications developed in right leg, osteomyelitis is one of the complications. This witness further admitted that the percent of assessment of disabilities varies from surgeon to surgeon by margin of 4 to 5 percent. This witness denied the suggestion that this witness has assessed the permanent partial disability on much higher side without taking into consideration the earlier medical case paper of the claimant. From the evidence of this witness, it appears that the claimant was seriously injured in the accident, at the time of accident, he was working as Mason. He got operated on two

occasions for the injuries sustained by him.

9. While considering the income of the claimant, the Tribunal has not considered the evidence of owner of claimant i.e. witness no. 3. The Tribunal has observed that the claimant was working as a Mason. So, it was not possible for the claimant to get the work everyday. Hence, the Tribunal has considered the monthly income of Rs. 2000/- and on the basis of 80 percent disability, the Tribunal has assessed the income of Rs. 1600/- per month. On that basis calculations are done. I do not find any infirmity in it. I am unable to understand the contention of learned counsel for the appellant that the Tribunal should have considered Rs. 1000/- income of claimant when it has come on record that he was earning Rs. 100/- per day as a Mason. There is evidence in that regard produced on record but, Tribunal has considered Rs. 2000/- per month which is proper.

10. In respect of disability of claimant. It is contention of learned counsel for appellant that the disability is considered on higher side. Earlier the disability certificate was issued to the appellant up to 55 percent. Admittedly, the appellant sustained serious injury in the accident, he was admitted in the hospital for

couple of months. He took treatment in various hospitals, he was operated twice for the said accident. PW-2 Dr. Satish Puranik who has categorically stated about the injury sustained by the claimant and complications developed in the said injuries and deformities occurred .

11. Though, the learned counsel for the appellant submits that earlier 55 percent disability certificate was issued to the claimant but, it was not confronted to Dr. Puranik in the evidence. Dr. Puranik is Orthopedic Surgeon, who operated the claimant. So, I do not find merit in the contention of learned counsel for appellant that disability certificated is issued on higher side. It has come on record that after the accident, the claimant is unable to do any work. The Tribunal has considered all the aspects and on that basis, compensation is awarded , which is proper.

12. The appeal is devoid of merit and I pass following order:

ORDER

1. Appeal is dismissed. No order as to cost.
2. Claimant is permitted to withdraw the amount along with accrued interest thereon deposited

by appellant, if not withdrawn earlier.

13. Pending applications, if any, are disposed of.

(S. G. DIGE, J.)