IN THE HIGH COURT OF JUDICATURE AT BOMBAY, AURANGABAD BENCH, AT AURANGABAD.

First Appeal No. 2106 of 2013

United India Insurance Co. Ltd.,
Through its Divisional Manager and authorised representative & signatory, Ahmednagar,
Divisional Office,
Kisan Kranti Building, Ahmednagar, .. Appellant
District : Ahmednagar. (Original Opponent No.2)

versus

1. Dilawar Mahebub Attar,
   Age : 61 years,
   Occupation : Business,
   R/o. Ghandi Nagar, Kopargaon,
   Taluka : Kopargaon,
   District : Ahmednagar.

2. Hashim Indras Ahmed Vakilahmed,
   Age : Major, .. Respondents.
   Occupation : Business, (No.1 - Original claimant
   R/o. Bhaji Mandai, Beed, &
   District : Beed. No.2 - Original opponent No.1)

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Mr. A.B. Gatne, Advocate, for the appellant.

Mr. A.S. Gandhi, Advocate, for respondent no.1.

Respondent no.2 served (Absent).

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CORAM : A.M. BADAR, J.

DATE : 16TH NOVEMBER 2015

ORAL JUDGMENT :

1. This appeal filed by the insurer challenging the judgment and order passed by the learned Member of the Motor Accident Claims Tribunal, Kopargaon [District : Ahmednagar], on 20-4-2013, in M.A.C.P. No. 33/2007, by which, claim petition under Section 166 of the Motor Vehicles Act, 1988, of respondent no.1 - Dilawar is partly allowed. The learned Member of the Motor Accident Claims Tribunal, Kopargaon, was pleased to award compensation of Rs. 99,200/- with interest at the rate of 8 % per annum from the date of filing of petition till realization of whole amount on account of damages suffered by respondent no.1 / original claimant in the vehicular accident which took place on 2-11-2006.

2. Respondent no.1 herein was the claimant before the Tribunal, whereas respondent no.2 herein was owner of the truck involved in the accident. For the sake of convenience, parties hereinafter are referred to its capacity.

3. The facts leading to the institution of the present appeal can be summarized thus :-

(a) Respondent no.1 / claimant filed a petition under Section 166 of the Motor Vehicles Act, 1988, claiming compensation of Rs. 2,00,000/- on account of damages suffered by him in the vehicular accident which took place on 2-11-2006 because of dash of truck bearing No. MTB-3926 owned by original respondent no.2 and insured by the appellant / original respondent no.2. It was case of the claimant before the Tribunal, that he was occupant of the Tata Sumo vehicle bearing No. MH-20/Y-8178. When that Tata Sumo was proceeding from Aurangabad towards Bidkin on Paithan Road, near Maruti Farticame Factory, truck bearing registration No. MTB-3926 came from behind in very excessive speed and gave dash to Tata Sumo vehicle from rear side. Because of this accident, according to the claimant, he suffered several fractures for which he was required to take treatment in the Government Medical College Hospital at Aurangabad, as well as in Sainath Hospital at Shirdi. On account of pecuniary as well as non-pecuniary damages, the claimant lodged claim of Rs. 2,00,000/-

(b) By filing written statement at Exhibit 29, respondent no.2 - owner of the truck bearing No. MTB-3926 opposed the petition by denying each and every adverse averment and contended that his truck was validly insured with the appellant (original respondent no.2) - Insurance Company. He further contended that the claim is bad for non-joinder of necessary parties. Owner of the truck further contended that his truck was being driven with low speed by left side of the road by following rules and regulations, but driver of the Tata Sumo vehicle was rash and negligent in driving the same.

(c) Present appellant - Insurance Company opposed the claim by filing written statement at Exhibit 29 and contended that the petition is bad for non-joinder of necessary parties. The Insurance Company denied each and every adverse averment and contended that the insured truck was driven in slow speed by left side of the road, but accident happened due to rash and negligent driving of the Tata Sumo vehicle. The Insurance

Company further raised contention that driver of the truck bearing No. MTB-3926 was not holding valid and effective driving license and on account of breach of terms and conditions of insurance policy, the insurer is not liable to indemnify the insurer. The Insurance Company also disputed quantum of compensation claimed by the claimant.

4. On the basis of rival pleadings, issues were framed at Exhibit 24 and parties went in trial. In support of his claim, claimant adduced evidence on affidavit at Exhibit 25 and he was cross examined by original respondent no.2 (present appellant) - Insurance Company. The claimant has placed reliance on Police papers in respect of accident as well as papers of medical treatment. No evidence is adduced either by insurer or Insurance Company. After hearing the parties, by the impugned judgment and order dated 20-4-2013, the learned Member of the Motor Accident Claims Tribunal, Kopargaon, was pleased to allow the claim petition partly by awarding compensation of Rs. 99,200/- with interest at the rate of 8 % per annum to the claimant.

5. Heard Shri Gatne, the learned Counsel appearing for the appellant / original respondent no.2. He vehemently argued that the claimant has not proved that he was the occupant of the Tata Sumo vehicle. According to Shri Gatne, the FIR lodged by the driver of the Tata Sumo vehicle does not reflect name of the claimant as person injured in the accident. He submitted that after lapse of time, statement of the claimant was recorded by Police and thereafter driver of the Tata Sumo vehicle gave supplementary statement thereby including the name of the claimant as a person injured in the accident.

6. Shri Gatne, the learned Counsel appearing for the appellant further submitted that it is undisputed position emerging on record, that driver of the offending truck was not holding valid driving license for heavy goods vehicle and therefore on account of breach of terms and conditions of the insurance policy, the Insurance Company is not liable to indemnify the owner of the truck involved in the accident. In order to buttress this submission, Shri Gatne has relied on judgments of the Hon'ble Apex Court in the case of ***Ram Babu Tiwari Vs. United India Insurance Company Limited and others***, reported in ***(2008) 8 SCC 165***, and in the case of ***Bhuwan Singh Vs. Oriental Insurance Company Limited & another***, reported in ***(2009) 5 SCC 136.***

7. Thirdly, Shri Gatne, the learned Counsel for the appellant, submitted that the learned Member of the Tribunal proceeded on wrong premises in deciding the claim petition. The learned Member has presumed that injured claimant was driving the Tata Sumo vehicle and the Insurance Company had taken a stand that the injured claimant all of a sudden stopped the Tata Sumo vehicle causing the accident. This according to Shri Gatne, the learned Counsel for the appellant, was not the factual position. The claimant was alleged to be the occupant in the Tata Sumo vehicle and the Insurance Company had not taken any defence that the accident happened because of contributory negligence of the claimant. As such, according to Shri Gatne, the learned Counsel for the appellant, the matter needs to be remanded to the Tribunal for fresh determination.

8. Shri Gatne, the learned Counsel for the appellant, further

contended that in absence of medical evidence on record, the learned Tribunal erred in coming to the conclusion that the claimant suffered 15 % permanent disability. Similarly, according to him, the learned Tribunal further erred in equating the permanent disability so assessed with loss of future income of the claimant. Therefore, in his submission, appeal needs to be allowed.

9. Per contra, Shri Gandhi, the learned Counsel appearing for respondent no.1 - claimant supported the impugned judgment and order by contending that ocular evidence of the claimant coupled with Police papers on record is sufficient to conclude that the claimant was the occupant of the Tata Sumo vehicle involved in the accident. He further submitted that non-examination of the Doctor is of no consequence and in order to substantiate this contention, he has placed reliance on judgment of the Hon'ble Apex Court in the case of ***Raj Kumar Vs. Ajay Kumar and another***, reported in ***2011(2) Mh.L.J. 569***.

10. Respondent no.2 - owner of the truck bearing No. MTB-3926 involved in the accident - despite service of notice for final hearing to him, has chosen to remain absent, nor he has put in appearance through Counsel on his behalf.

11. At the outset, let us examine whether the claimant has proved that he was occupant of Tata Sumo vehicle bearing registration No. MH-20/Y-8178 and has suffered injuries in the accident in question. We are having on record, eye witness account of the accident coming from the mouth of the claimant. His evidence shows that on 2-11-2006, he was

travelling in Tata Sumo vehicle which met with accident because of forceful dash from rear side of the vehicle bearing registration No. MTB-3926 owned by Mr. Hashim Indras and insured with United India Insurance Co. Ltd. Evidence of the claimant shows that this accident has resulted in lodging report of the same with Police by the driver. In the case of ***National Insurance Company Ltd. Vs. Rattani & others***, reported in ***2009 ACJ 925***, the Hon'ble Apex Court has held that FIR can be looked into if the same is made part of claim petition for finding out the mode and manner in which the accident had happened. In the case in hand, FIR of the accident in question was lodged by driver of Tata Sumo vehicle, namely, Prakash Bhore. The FIR shows that the accident in question happened because of dash of the truck to Tata Sumo vehicle driven by him. No doubt, in the FIR name of the claimant is not mentioned, but FIR cannot be an encyclopedia of crime. The object of the FIR is to set the criminal law in motion. Perusal of certified copy of the charge sheet placed on record by the claimant shows that name of the claimant is shown as witness. Statement of the claimant seems to have been recorded during the course of investigation and supplementary statement of driver Prakash Bhore shows that apart from injured named by him in the FIR, some other persons were also travelling in the Tata Sumo vehicle driven by him.

12. Evidence of the claimant shows that immediately after the accident he was required to be hospitalized. Claimant has placed on record discharge card issued by the Government Medical College Hospital, Aurangabad, which shows that the claimant had taken treatment as indoor patient in the Government Medical College Hospital for fracture injury to his femur. This material on record is more than sufficient to

conclude that the claimant was occupant of the Tata Sumo vehicle which met with accident due to dash given by the truck bearing registration No. MTB-3926. As such, submission of the learned Counsel for the appellant, that the claimant was not occupant of the Tata Sumo vehicle, cannot be accepted.

13. Now, let us examine whether appellant - Insurance Company has proved that driver of the insured truck was not having license to drive heavy goods vehicle and therefore on account of breach of terms and conditions of insurance policy, the Insurance Company is not liable to pay compensation. No doubt, such plea is taken by the Insurance Company in its written statement but there is absolutely no iota of evidence on record to come to the conclusion that the driver of the truck was not holding valid driving license enabling him to drive heavy goods vehicle i.e. the truck in question. In the case of ***National Insurance Co. Ltd. Vs. Swaran Singh and others***, reported in ***2004 (1) ACJ 1***, the Hon'ble Supreme Court has held that the Insurance Companies in order to avoid their liability must not only establish available defences but also establish breach of terms of policy on the part of the owner of the vehicle. The burden of proof would be on them. In the case in hand, it was incumbent on the part of Insurance Company to adduce some evidence on record to come to the conclusion that driver of the offending vehicle i.e. the truck was not holding valid driving license. In absence of such evidence, the learned Tribunal has correctly come to the conclusion that the Insurance Company has failed to prove breach of terms and conditions of contract of insurance.

14. In the case of ***Ram Babu Tiwari (supra)***, the case was in

respect of renewal of license and it was held therein that in absence of renewal of driving license and when the application for renewal of license is made more than 30 days after date of its expiry, the Insurance Company cannot be made liable to indemnify the insurer. In the case of ***Bhuwan Singh (supra)***, relied upon by Shri Gatne, the learned Counsel for the appellant, it is held that in view of Section 58 of the Evidence Act, the fact admitted need not be proved. In the instant case, it is not an admitted fact that driver of the offending truck was not holding valid driving license. Apart from this, there is no such evidence on record to show that driver of the offending vehicle was not holding valid driving license. As such, both these reported rulings are of no consequence. As such, no infirmity could be found in the finding recorded by the learned Tribunal on this aspect.

15. Contention of Shri Gatne, the learned Counsel for the appellant, that the Tribunal has proceeded on wrong premises of facts, is also inconsequential because those are found in narration of facts by the learned Tribunal. However, reasoning part of the impugned judgment and order does not show that the learned Tribunal has recorded any perverse finding on the aspect of mode and manner of happening of the accident.

16. The impugned judgment and order is also assailed on quantum of compensation awarded to the claimant. Evidence of the claimant shows that he was doing the work of selling bangles by visiting various villages on his bicycle. This nature of work of the claimant needs to be kept in mind while determining quantum of compensation. The learned Tribunal came to the conclusion that the claimant has suffered 15 % permanent disability in this vehicular accident by relying on disability

certificate produced by the claimant on record. At this juncture, it is apposite to note that the claimant has failed to examine the Doctor who had issued disability certificate placed on record. Apart from this, the learned Tribunal has applied multiplier of 11 after assessing income of the claimant at Rs. 4,000/- per month. In other words, the learned Tribunal has equated percentage of permanent disability assessed by it to the loss of future earning capacity. Such course of action is totally incorrect. In the case of ***Raj Kumar Vs. Ajay Kumar and another (supra)***, relied by the learned Counsel for respondent no.1 - claimant, in para 9 of the judgment, the Hon'ble Apex Court has considered the facts which can be assessed by the Tribunal in order to determine the effect of permanent disability on earning capacity of the injured. In para 9 of the judgment, the Hon'ble Apex Court has observed thus :-

> " Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence : (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes

> that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity. "

17. In view of law laid down by the Hon'ble Apex Court, finding of the learned Tribunal and the mode of assessment of loss of future income by applying multiplier of 11 cannot be endorsed. The learned Tribunal should have considered and decided what was loss of future income caused to the claimant because of injuries suffered by him in the vehicular accident. The loss of future income ought to have been capitalized by the learned Tribunal.

18. Standard of proof in proceedings under the Motor Vehicles Act, 1988, which piece of welfare legislation, cannot be equated to the standard of proof in civil cases. Now, therefore let us examine whether the claimant has suffered any loss of future earning capacity because of injuries suffered by him in the vehicular accident in question. Evidence of the claimant shows that he had taken initial treatment at Government Medical College Hospital at Aurangabad and subsequently at Sainath Hospital at Shirdi. The claimant has placed on record discharge card of

both these hospitals and the Tribunal could have looked into these two documents in order to examine whether evidence of claimant gains corroboration from them. Evidence of the claimant shows that his left femur bone was fractured in the accident in question and because of injuries suffered by him, he is unable to effectively ride on bicycle and to carry on occupation of selling bangles in various villages. The claimant has deposed that he is rendered 100 % functional disability because of injuries suffered by him in the accident in question. Medical evidence in the nature of discharge card placed on record by the claimant corroborates evidence of the claimant that his left femur bone was fractured in the accident in question. It is seen that the claimant was hospitalized as indoor patient in the Government Medical College Hospital at Aurangabad from 3-11-2006 to 18-11-2006 and at Sainath Hospital at Shirdi from 7-1-2007 to 16-1-2007. If these aspects are considered, then one can safely conclude that the claimant must have suffered at least 15 % loss of future earning. Therefore though the learned Tribunal erred in applying method of multiplier and by holding that the claimant had suffered 15 % disability, nature of injuries suffered by the claimant and his evidence shows that he has certainly suffered loss of future income because of injuries suffered by him in the accident and therefore it cannot be said that the award of Rs. 79,200/- on account of loss of income by the learned Member of the Tribunal is erroneous though the reasonings for the same does not appear to be correct.

19. As such, for the reasons recorded above, the appeal is devoid of merits. Hence, the following order :

ORDER

(a) The Appeal is dismissed with no order as to costs.

(b) Claimant / Respondent No.1 is permitted to withdraw the entire amount of compensation deposited by the appellant - Insurance Company in this Court.

(A.M. BADAR)
JUDGE

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