

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**FIRST APPEAL NO. 944 OF 2017
WITH
CA/6910/2012 IN FA/944/2017**

THE NEW INDIA ASSURANCE CO. LTD THR MANAGER
VERSUS
SHESHRAO MOHANRAO SHELKE AND OTHERS

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Advocate for Appellant : Mr D P Deshpande
Advocate for Respondents : Mr R R Karpe

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**CORAM : V.K. JADHAV, J.
Dated: July 31, 2017**

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PER COURT :-

1. Heard finally with consent at admission stage.
2. Being aggrieved by the judgment and award passed by the Chairman, Motor Accident Claims Tribunal, Ahmednagar dated 30.9.2011 in MACP No.871/1999, the original respondent no.3-insurer has preferred this First Appeal.
3. Brief facts, giving rise to the present appeals are as follows :-
 - a] On 9.4.1999 the claimant was proceeding by Nagar

Daund road on his motorcycle. At that time one truck bearing registration No.MH-17/C-6227 came from the opposite direction in speed and gave dash to the motor cycle. In consequence of which, the claimant has sustained injuries. He was immediately shifted to one private hospital at Ahmednagar. The claimant has sustained injuries to his leg, fracture of clavicle right, compound fracture of tibia fibula left. He was operated and still rod was inserted in his leg. Injuries sustained by the claimant also resulted into permanent disablement to the extent of 20%. The claimant also incurred medical expenses and other consequential expenses. The claimant has, therefore, approached the tribunal by filing MACP No.871/1999 for grant of compensation under the various heads.

b] Respondent owner of the truck has strongly resisted the claim petition by filing written statement. It has been contended that the accident occurred on account of rash and negligent driving on the part of the claimant himself and driver of the truck was not at

fault.

c] The insurer has also resisted the claim petition by filing written statement and resisted the claim petition on the similar grounds that driver of the truck was not at fault and further also raised a defence that the insured has committed breach of the terms and conditions of the policy.

d] The claimant has adduced oral and documentary evidence in support of his contentions. The insurer has not adduced any oral or documentary evidence. Initially, the tribunal, Ahmednagar vide its judgment and award dated 24.4.2009 was pleased to allow the claim petition partly and directed the respondents to pay compensation of Rs.64,000/- in total with the findings that the driver of the truck as well as the claimants are equally responsible for the accident.

e] Being aggrieved by the said judgment and award dated 24.4.2009 the claimant has approached to this court by filing FA No.208/2010. In the said appeal, the

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claimant has also filed an application under section 41 Rule 27 of the CPC for production of the additional evidence on the ground that even during the pendency of the claim petition, he was required to undergo operation for the injuries sustained and he may be allowed to produce the relevant documents on record and to claim compensation for further medical expenses incurred by the claimant. This Court by order dated 18.4.2011 in the said FA 208/2010 partly allowed the appeal, quashed and set aside the judgment and award passed by the tribunal and remitted the matter back to the tribunal for decision afresh after giving an opportunity to the parties to adduce evidence on the additional documents.

4. The learned Chairman, Motor Accident Claims Tribunal, Ahmednagar by the impugned judgment and award dated 30.9.2011 partly allowed the petition and thereby directed the respondents to pay the compensation jointly and severally of Rs.1,75,000/- to the petitioner/claimant on account of permanent dis-

ability sustained by him in the vehicular accident. Being aggrieved by the same, insurer has preferred this appeal.

5. Learned counsel for the insurer submits that, this Court in FA No.208/2010 by order dated 18.4.2011 remitted the matter to the tribunal for decision afresh after giving an opportunity to the parties to adduce evidence on the additional documents only. Learned counsel submits that, thus, after remand the tribunal ought to have considered the additional evidence of the claimant to the extent of medical expenses incurred by him during the pendency of the claim petition. However, the tribunal has considered the matter afresh and even changed the findings recorded in the earlier matter about negligence on the part of the driver of the truck and the claimant and awarded exorbitant amount of compensation. The same is not permissible. Learned counsel submits that, even in the earlier judgment the tribunal has applied multiplier '15' however, in the later judgment applied multiplier '18' and as such awarded

excessive amount of compensation.

6. Learned counsel for the claimant submits that this court by order dated 18.4.2011 in FA No.208/2010 remitted the matter to the tribunal for a decision afresh. Further, this court has also quashed and set aside the impugned judgment and award passed by the tribunal dated 24.4.2009. This court has also directed the tribunal to give an opportunity of hearing to the parties to adduce the evidence on additional documents and further directed that the tribunal to decide the amendment application filed by the claimant in the court. This court has also not opined anything on the merits of the matter. Learned counsel submits that, in view of the order passed by this court, tribunal has decided the matter afresh and, as such, earlier finding recorded by the tribunal are not helpful to the insurer. The impugned judgment and award passed by the tribunal cannot be set aside on this ground alone. Learned counsel submits that, the tribunal has awarded just and reasonable compensation. In the earlier

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judgment Tribunal has erroneously applied multiplier '15'. The appellant claimant was 25 years of age at the time of accident and as such, relevant multiplier would be '18' instead of '15'. In the later judgment the tribunal has referred the judgment of the Apex Court in case of Sarla Varma and others Vs. Delhi Transport Corporation and another, reported in 2009 (2) TAC 677, and correctly applied the relevant multiplier '18'. Learned counsel submits that, though the tribunal has considered loss of future income in the light of disablement sustained by the claimant, failed to award any compensation for pains and sufferings, diet, attendance charges, transportation charges. Tribunal has also not awarded any compensation under the head of permanent disablement separately. The tribunal has awarded the rate of interest @ 7.5% instead of 9%. The claimant is entitled for the same.

Learned counsel for respondent claimant in order to substantiate his submissions places his reliance on a judgment in case of **Jitendra Khimshankar Trivedi and others Vs. Kasam Daud Kumbhar and others**

reported in (2015) 4 Supreme Court Cases 237.

7. This Court by order dated 18.4.2011 in First Appeal No.208/2010 has partly allowed the appeal and quashed and set aside the earlier judgment and award passed by the Tribunal and remitted the matter for decision afresh after giving an opportunity to adduce evidence on the additional documents. This Court has quashed and set aside the entire judgment and award passed by the tribunal. This court has not remanded the matter to the tribunal only to the extent of adducing the evidence on additional documents and to award the compensation on the basis of those additional documents only. On the other hand, this court has directed the tribunal to decide the matter afresh after giving an opportunity to the parties to adduce evidence on the additional documents.

8. In paragraph no.14 of the judgment, the learned Chairman of the Tribunal has elaborately dealt with the question of negligence. Though the tribunal has

observed that rider of the motorcycle went to the wrong side of the road and dashed against the truck, only by considering the size of the vehicle concluded that negligence on the part of the claimant is to the extent of 25% whereas negligence on the part of the driver of the truck is to the extent of 75%. Both counsel agree that on the same set of evidence, the tribunal in the earlier judgment has recorded the finding of negligence to the extent of 50% each on the part of the claimant and driver of the truck. After remand, the parties have not adduced any fresh evidence so as to the point of negligence is concerned. Even, on perusal of the contents of the spot panchnama and the width of the road and directions, it appears that the claimant who was riding the motorcycle at the time of accident, went to the wrong side of the road and gave dash to the truck coming from the opposite direction. Thus, considering the evidence on record, it would be just and appropriate if the negligence on the part of the claimant as well as driver of the truck is considered at 50% (Fifty Percent) each. I accordingly, answer issue nos. 1 and 2 to the

effect that the accident occurred due to contributory negligence of the claimant and opponent no.2 i.e. driver of the truck to the extent of 50% each.

9. So far as quantum of the compensation is concerned, it appears that, the tribunal has correctly applied the multiplier '18' in consonance with the age of the appellant-claimant as on the date of accident. The tribunal has considered loss of income to the tune of Rs.1,29,600/-, medical expenses to the tune of Rs.54,340/- and additional medical expenses Rs.35,000/- and accordingly calculated total amount of Rs.2,18,940/-. However, it appears that, the tribunal has awarded only six thousands and some odd amount for mental and physical agony and other heads. The petitioner has examined PW 3 Dr. Pandurang Daule. He is M.S. Ortho. and runs his own hospital. The claimant was admitted in his hospital from 9.4.1999 to 30.4.1999. The claimant has sustained compound fracture of tibia fibula left. Medical certificate exh.85 is duly proved. The claimant was operated on 10.5.2009 and medical

certificate is produced on record to that effect and the same is marked at exh.86. According to witness Dr. Daule, second operation was performed by him and rods which were installed by him were removed in the second operation of 2009. Under these circumstances, the tribunal ought to have awarded the compensation separately for pains and sufferings, loss of amenities in future life and permanent disablement. The claimant is entitled for an amount of Rs.40,000/- each on these three heads i.e. pains and sufferings, loss of amenities in future life and permanent disablement. The claimant is also entitled for an amount of Rs.10,000/- for transportation, Rs.10,000/- for attendant charges and Rs.5,000/- for diet. Thus total compensation comes to Rs.3,63,940/- and considering the findings recorded to issue no.1 and 2, the claimant is entitled for the compensation to the extent of 50% i.e. 1,81,970/- rounded to 1,81,000/-.

10. Thus, the amount of compensation as worked out by the tribunal requires re-determination. Hence,

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following order.

O R D E R

1. Appeal is hereby partly allowed. No costs.
2. The judgment and Award passed by the Chairman, Motor Accident Claims Tribunal, Ahmednagar, dated 30.9.2011 in M.A.C.P. No.871/1999 is hereby modified in the following manner.
 - A] The respondents shall jointly and severally pay total compensation of Rs.1,81,000/- (Rs. One lac eighty one thousand) to the petitioner on account of the permanent disability sustained by him in the vehicular accident with interest @ 9% p.a. from the date of petition till the realization of the entire amount.
3. Award be drawn up as per the above modifications.
4. Appeal is accordingly disposed of.
5. If any amount is paid as per the judgment and award passed by the Tribunal, the same shall be the part of the award after modification.

6. Appeal is accordingly disposed of.
7. Pending civil application also stands disposed of.
8. If any amount is deposited before this Court, the claimant is permitted to withdraw the same.

(V.K. JADHAV, J.)

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