

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

FIRST APPEAL NO. 423 OF 2014

JANARDHAN MALKUAPPA HUNDIWALE
VERSUS
KAUTIKRAO FAKIRRAO BICHARE AND OTHERS

...
Advocate for Appellant : Mr A A Joshi
Advocate for Respondent 3 : Mr S S Rathi
Respondent nos. 1 and 2 served – absent.

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CORAM : V.K. JADHAV, J.
Dated: February 06, 2017

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PER COURT :-

1. Heard finally with the consent of the parties, at admission stage.
2. Being aggrieved by the judgment and award passed by the Chairman, Motor accident Claims, Tribunal, Aurangabad dated 19.10.2011 in MACP No.527/2009, the original claimant has preferred this appeal to the extent of quantum.
3. It is not a matter under dispute that, the appellant claimant sustained permanent disability in the accident on account of the rash and negligent driving of the truck bearing registration No.MH-20/W-7380 owned by

respondent no.2 and insured with respondent no.3 and in the said accident, the appellant claimant no.1 sustained injuries to his right leg, thigh and other parts of the body.

4. Learned counsel for the original claimant submits that after accident, the appellant had undergone treatment of CW 2 Dr. Deshpande, who is the Consultant Surgeon and Medical Director of Sumanjananli Hospital. According to CW 2 Dr. Deshpande, appellant claimant had lost power of his right leg and there was stiffness of right ankle and knee joint. It is not possible for the appellant claimant to move ankle and knee joint. Thus, CW 2 Dr. Deshpande has assessed permanent disability of the claimant to the extent of 15% and accordingly issued disability certificate Exh.51. Learned counsel submits that on account of said disability sustained by the claimant on his right leg, it is not possible for him to drive the motor vehicle in future. Thus, such disablement has affected his earning capacity to the extent of 100%. However, the Tribunal has not considered the same. The Tribunal

has erroneously considered the percentage of disability as percentage affecting the earning capacity of the appellant claimant and accordingly assessed loss of his future income. Learned counsel submits that, even though the appellant claimant has deposed on oath about the medical expenses incurred by him to the extent of Rs.3,20,997/- and CW 2 Dr. Deshpande has also supported the same and receipt is also marked at exh.50, the Tribunal has awarded a very meager amount towards medical expenses.

5. Learned counsel for respondent insurer submits that the appellant claimant has not sustained any fractured injury as such. CW 2 Dr. Deshpande is not a orthopedician and he has assessed disablement merely on the basis of clinical examination. Even, witness Dr. Deshpande has also accepted that there was no fracture to knee joint and ankle of the claimant. On the backdrop of this, the learned Member of the Tribunal has rightly considered the percentage of disablement as percentage for considering the loss of earning capacity.

The learned Member of the Tribunal has considered the pecuniary loss including medical expenses and also considered the compensation under non-pecuniary heads. The learned Member of the Tribunal has awarded just and reasonable compensation. No interference is required.

6. On careful perusal of the evidence led by the parties and impugned judgment and award, it appears that after the accident the appellant claimant was shifted to Sumananjali Hospital, where he was treated. CW 2 Dr.Deshpande has deposed that appellant claimant had laceration admeasuring 3cms x 6cms on his right upper arm. He had degloving injury on right thigh and leg. There was major skin loss. The muscles were necrosed and lost in parts. The muscles of right leg also were exposed and lost alongwith fascia. His condition was critical and he was kept in surgical intensive care unit. He has discharged the claimant on 20.5.2009. Discharge card is placed on record and the same is marked at 48. On 5.6.2010 he has again examined the appellant claimant for assessing the

disability. According to him, appellant claimant lost power of right leg and he had stiffness of right ankle joint and knee joint. He further deposed that it was not possible for the appellant claimant to move the ankle and knee joint. Accordingly, he has assessed permanent disability and disability certificate which is marked at Exh.51. He has further opined that, the claimant cannot work as driver of the motor vehicle, however, he can do other routine work. In his cross examination, however, he has admitted that, he is general surgeon and not orthopedic surgeon. He has further admitted that he has assessed disability of the claimant on the basis of clinical examination. There was no fracture of knee joint or ankle joint. He has further admitted in his cross examination that extent of disability sustained by the claimant can also be reduced in future.

7. I have also carefully gone through the evidence of the claimant. He has stated in his affidavit of evidence that due to injuries sustained in the accident, he has lost sensation of skin and loss of function of the sensation is one of the reasons for the new injuries and

further infection. According to him, due to said injuries movement of his leg are restricted and it also affect knee joint and ankle joint. On going through the evidence of the claimant as well as CW 2 Dr. Deshpande, it appears that the appellant claimant is mainly suffering from major skin loss and in consequence of which muscles were necrosed and lost in parts. It is not clear from the evidence of CW 2 Dr. Deshpande as to how aforesaid disablement has affected the earning capacity of the appellant claimant who was working as a driver on motor vehicle prior to the accident. CW 2 Dr. Deshpande has also opined that appellant claimant can do other routine work. There was no fracture of knee joint or ankle joint of the appellant claimant. Further extent of disability sustained by the claimant can also be reduced in future. In view of the above, I do not find any fault in the observations made by the learned Chairman of the Tribunal that the claimant is entitled for the compensation on account of loss in the earning capacity to the extent of percentage of disablement and not more than that.

CW 2 Dr. Deshpande has deposed that appellant claimant has incurred medical expenses to the extent of 3,20,927/- which includes medical treatment and hospitalization. Further, appellant claimant was given all medication from the hospital though bill at Exh.49 is for amount of Rs.3,61,939/-, CW 2 Dr. Deshpande has given concession and charged Rs.3,20,997/-. A separate receipt is issued to that effect after receiving Rs.3,20,997/- and it is marked at Exh.50. On perusal of the impugned judgment and award, it appears that, learned Member of the Tribunal has awarded compensation of Rs.72,259/- without taking into account receipt Exh.50 coupled with receipt below Exh.49. In my considered opinion, the claimant is entitled for additional amount of Rs.2,48,000/- in consonance with bill Exh.49 and receipt Exh.50.

8. So far as compensation awarded under the non pecuniary heads are concerned, it appears that the learned Chairman of the Tribunal has awarded just and reasonable compensation. No interference is required. Impugned judgment and award is required modification

to that extent only. Hence, order.

O R D E R

- i. First appeal is hereby partly allowed with proportionate costs.
- ii. The Judgment and Award passed by the Chairman, Motor accident Claims Tribunal, Aurangabad dated 19.10.2011 in MACP No.527/2009 is modified in the following manner.
 - a] The claimant is entitled for an amount of Rs.5,51,700/- towards compensation inclusive of No fault Liability and respondents no. 1 to 3 do pay jointly and severally compensation of Rs.5,51,700/- (Rs. Five Lakh Fifty One Thousand Seven Hundred only) to claimant with interest @ 9% p.a. from the date of institution of the petition i.e. 23.7.2009 till the realization of the entire amount.
- iii. Rest of the judgment and award stands confirmed.
- iv. Award be drawn up as per above modifications.

- v. The amount of compensation, if paid, to the claimant as per the earlier judgment and award passed by the Tribunal, the same shall be adjusted in the award as modified above.
- vi. Appeal is accordingly disposed of.

(V.K. JADHAV, J.)

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aaa/-