

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 2101 OF 2012
WITH
CIVIL APPLICATION NO. 14291 OF 2016

NEW INDIA ASSURANCE COMPANY LIMITED
VERSUS
USHA RADHESHYAM JHUNJHUNWALA AND ANOTHER

.....
Advocate for the appellant: Mr. A.B. Kadethankar
Advocate for respondent No.1: Mr. A.C. Darandale h/f Mr. S.P. Darandale
Advocate for R. No.2:Mr. M.S. Shaikh h/f Mr. Sachin Deshmukh
.....

WITH
FIRST APPEAL NO. 1712 OF 2012
WITH
CIVIL APPLICATION NO. 11038 OF 2012

USHA RADHESHYAM JHUNJHUNWALA
VERSUS
MOHAMMAD JAKI MOHAMMAD IBRAHIM AND OTHERS

.....
Advocate for the appellant: Mr. A.C. Darandale
Advocate for respondent No.1: Mr. M.S. Shaikh h/f Mr. Sachin Deshmukh
Advocate for Respondent No.3: Mr. A.B. Kadethankar
.....

CORAM : V. K. JADHAV, J.
DATED : 31st JANUARY, 2017

PER COURT:-

1. Being aggrieved by the judgment and award dated 2.7.2012 passed by the learned Chairman, M.A.C.T. Aurangabad in M.A.C.P. No. 350 of 2009, the original claimant has preferred first appeal No. 1712 of 2012 and original respondent insurer has preferred first appeal No. 2101 of 2012. Both these appeals are preferred to the

extent of quantum and they are being decided by this common order.

2. Brief facts giving rise to the present appeals are as follows:-

a) On 30.4.2008, the claimant Usha was travelling in Skoda car bearing registration No. MH-12-BS-1234. On that day, at about 20.15 hours, on Jalna-Aurangabad road, near village Karmad Slum area, one Indica car, bearing registration No. MH-20-AG-6080 coming from opposite direction, gave dash to the Skoda car. In consequence of which, the claimant Usha had sustained grievous injuries and fracture injury on her left leg and other injuries on her face etc. She was immediately shifted to the Hospital of Dr. Saoji, Orthopedic Hospital, Aurangabad, where she was treated for about 9 days. The claimant Usha was thereafter shifted to Bombay Hospital and Medical Research Center at Bombay, where she was remained under treatment till 22.5.2008. After some gap, she had again taken treatment in the same hospital at Bombay and treatment was going on. The claimant incurred huge medical expenses. She had undergone operation in those hospitals and remained hospitalized for total period of 71 days. The claimant also sustained injuries on her left leg which resulted into permanent disablement to the extent of 40% as per the certificate issued by Orthopedician Dr. Saoji. The claimant Usha has therefore, approached the Motor Accident Claims

Tribunal, Aurangabad for grant of compensation under various heads.

b) Respondent Nos. 1 and 2 owner and driver, though duly served, remained absent and therefore, hearing of claim petition ordered to be proceeded ex parte against them. The insurer has strongly resisted the claim petition by filing written statement. It has contended that the accident had taken place on account of rash and negligent driving of Skoda car and therefore, the insurer is not liable to pay the compensation. It has also contended that the respondent driver of Indica car was not holding valid and effective driving licence to drive the Indica car and thus there has been breach of the condition of policy. The claimant has adduced oral as well as documentary evidence in support of her contentions. The respondent has not adduced any evidence.

c) Learned Chairman of the Tribunal has recorded the finding in affirmative to issue No.2 and held that the accident occurred due to rash and negligent driving of driver of Indica car alone. The learned Chairman of the Tribunal, after considering the evidence on record directed the respondents to pay Rs.10,70,800/- as a compensation to the claimant, inclusive of 'no fault liability' amount, jointly and severally with interest @ 9% p.a. from the date of petition till

realization of entire amount. The claimant as well as insurer has preferred these two separate appeals to the extent of quantum only.

3. Learned counsel for the appellant claimant in first appeal No. 1712 of 2012 submits that the learned Chairman of the Tribunal has not considered the income of the claimant. The claimant was doing Saree business and also cultivating the agricultural lands. The claimant is also income tax payer. However, the Tribunal has considered the notional income of claimant for Rs.3000/- p.m. corresponds to Rs.36,000/- per year. The permanent disablement sustained by the claimant to the extent of 40% affected her earning capacity to the extent of 100%. However, the Tribunal has considered the percentage of said disablement as a criteria to find out the loss in earning capacity. The Tribunal has therefore, erroneously considered the loss of earning capacity to the extent of 40% though the claimant has sustained 100% loss of earning capacity. Even after filing of claim petition, the claimant has undergone treatment in Dhoot Hospital, Aurangabad and incurred expenses to the tune of Rs.2,00,000/- and the claimant is entitled for the same. The Tribunal has not awarded any amount under non pecuniary heads, such as pains and sufferings, loss of amenities in future life, attendance charges, etc. though the claimant is entitled for the same. The claimant has undergone near about four surgeries

and she remained hospitalized for 71 days in total. It is a part of record that the claimant cannot walk without support and it is difficult for her to carry out day to day work effectively, as it was prior to the accident, however, the Tribunal has not awarded any compensation under the aforesaid non pecuniary heads.

4. Learned counsel for the appellant insurer in first appeal No. 2101 of 2012 submits that the Tribunal has awarded exorbitant amount of compensation. The Tribunal has awarded compensation on the basis of documents Exh.124, 127 and 128. The said documents are the bills issued by Bombay Hospital, Mumbai. However, the claimant has not placed on record the prescription issued by Medical Officer and further has not examined any doctor from the said hospital to substantiate the contents of medical bills at Exh.124, 127 and 128. The claimant has not deposed before the Tribunal that she was doing Saree business and she was also personally cultivating the agricultural land. Furthermore, the copies of Income tax returns, as alleged, were not produced before the Tribunal. The claimant has not deposed before the Tribunal that on account of permanent disablement sustained by her, her earning capacity has been affected or that she would not be able to carry out the said business in future. In absence of any such evidence, the Tribunal has rightly considered the notional income of claimant at

Rs.3,000/- p.m. Furthermore, witness Dr. Saoji has not given his opinion as to how far the earning capacity of claimant is affected on account of disablement sustained by her. The claimant has also not deposed about it. Though the claimant has examined doctor on the point of injury sustained by her, on her left knee and the resultant permanent disablement, the doctor has not given his opinion that there is loss of earning capacity to the extent of 100% on account of said permanent disablement sustained by the claimant to the extent of 40%. The Tribunal has therefore, rightly assessed the compensation by considering the percentage of disablement as a loss of earning capacity. The Tribunal has awarded just and reasonable compensation under non pecuniary heads and no interference is required in it.

5. On perusal of the evidence adduced by the parties to the claim petition and the impugned judgment and award, it appears that the claimant has deposed her occupation as household. She has not deposed before the Tribunal that she is doing the business and also cultivating the agricultural land, personally. In absence of any evidence about her income from business and agricultural land, the Tribunal has rightly considered the notional income at Rs.3000/- corresponds to Rs.36,000/- per year. By filing civil application No. 11038 of 2012, the claimant has now tried to establish that she was

doing Saree business prior to the accident and she was also getting the income from agricultural sources. Even the claimant has produced alongwith said civil application, copies of income tax returns submitted prior to the date of accident. However, the claimant has not deposed about the said business before the Tribunal. There is no pleading to that effect. In absence of such pleading, the evidence cannot be considered and the said civil application is thus liable to be rejected.

6. Witness Dr. Saoji has deposed that the claimant Usha had undergone comminuted supracondylar fracture left femur. He has examined her for assessing the disability. He found stiffness in her left knee and accordingly assessed her disability to the extent of 40%. He has issued disability certificate in Form Comp. B and the same is marked at Exh.105. Though witness doctor Saoji in his cross examination stated that he has not followed the Mc-bride scale while assessing the disability of claimant but applied guess work on the basis of the clinical examination, considering the nature of injury and stiffness in the right knee, i do not think that witness Dr. Saoji, who is M.S. in Orthopedics erred in assessing the disability sustained by the claimant. However, witness No.2 Dr. Saoji and witness No.3 Dr. Jhunjhunwala have not deposed as to the effect of the said disablement on the claimant. They have not given their expert

opinion as to how far the said disablement affected day to day activities of the claimant, more particularly her earning capacity in future. The Tribunal has therefore, rightly taken such disablement, as percentage for loss of earning capacity and accordingly worked out the compensation for loss of future income. I do not find any fault in it. No interference is required.

7. The learned Chairman of the Tribunal, however, has not awarded any compensation under certain non pecuniary heads. Admittedly, the claimant has undergone four surgeries in various hospitals and incurred huge medical expenses. The Tribunal has awarded compensation under the head of medical expenses by considering the bills issued by various hospitals, however, failed to award any compensation for pains and sufferings. It is also a matter of record that the claimant remained under treatment in various hospitals for near about 71 days. In view of above, in my considered opinion, the claimant is entitled for amount of Rs.1,00,000/- for pains and sufferings. Considering the stiffness in the right knee and the restricted movement of the claimant, it would be just and appropriate to grant compensation of Rs.50,000/- on account of loss of amenities in future life. The claimant remained hospitalized for near about 71 days, therefore, she is entitled for amount of Rs.25,000/- for attendant charges.

8. Learned counsel for the appellant claimant has vehemently submitted that even after filing of claim petition, the claimant had to take treatment in Dhoot Hospital, Aurangabad and she incurred medical expenses to the tune of Rs.2,00,000/-. Learned counsel has brought the attention of this court to the documents submitted alongwith civil application No. 14291 of 2016. Dhoot hospital has issued discharge summary and the same is placed alongwith said civil application for withdrawing of the amount. On careful perusal of said certificate, it appears that in the year 2016, the claimant was diagnosed as Osteoarthritis right knee and accordingly she was treated in Dhoot Hospital, Aurangabad from 14.7.2016 to 18.7.2016. The cause for treatment on right knee is altogether different and it is a matter of record that claimant has not sustained any injury on her right leg in the accident nor witness doctor examined by the claimant have deposed about it. The claimant is not entitled for the said amount.

9. I do not find any substance in the submission made on behalf of the appellant insurer so far as the documents at Exh. 124, 127 and 128 are concerned. The claimant has examined witness No.5 Dr. Sagar Sakhale, who is serving as Officer on Special Duty, Medical Administration in Bombay Hospital and Medical Research Center,

Mumbai. He has deposed that the claimant Usha was admitted in the hospital from 29.6.2010 to 13.7.2010 and an amount of Rs.5,14,133/- was charged by the hospital for her treatment. The bill in respect of said expenses was issued by the hospital. The bill bears his signature. He has further deposed that the contents of said bill are correct. The said bill is marked at Exh.124. Further his attention was also drawn to the details of bills and contents thereof. The details of said bills are also bear his signature and they are marked at Exh.124/A and 124/B. Thus, the claimant has not only placed on record the bills for amount of Rs.5,14,133/- but also produced the details of bills by placing on record the documents Exh. 124/A and 124/B. Furthermore, doctor Sagar Sakhale has proved the contents of bill Exh.127 and 128. He has given all details in respect of treatment given to the claimant in the hospital as an indoor patient. He has admitted in his cross examination the said bills includes fees of surgeon and consultants. There is nothing in his cross examination to disbelieve him. The medical bills Exh. 124, 127 and 128 which are computerized bills with all requisite details. There is no reason to discard this evidence. The learned Chairman of the Tribunal has rightly considered the same.

10. In view of above discussion, I do not find any substance in the appeal preferred by the insurer. However, the appeal filed by the

claimant is required to be allowed partly by modifying the judgment and award passed by the Tribunal to the extent of quantum. Hence, I proceed to pass the following order:-

O R D E R

- I. The first appeal No.1712 of 2012 (Usha Radheshyam Jhunjhunwala vs. Mohammad Jaki Mohammad Ibrahim and others) is hereby partly allowed with proportionate costs.
- II. The judgment and award dated 2.7.2012 passed by the learned Chairman, M.A.C.T. Aurangabad in M.A.C.P. No. 350 of 2009 is hereby modified to the extent of quantum, in the following manner:-

“The claimant is entitled for amount of Rs.12,45,800.00 (Rs.10,70,800.00 + Rs.1,75,000.00) (Rupees Twelve lacs forty five thousand eight hundred only) towards compensation, inclusive the amount of 'no fault liability' and respondent Nos. 1 to 3 jointly and severally do pay the said amount of Rs.12,45,800.00 to the claimant with interest @ 9% p.a. from the date of petition i.e. 4.5.2009 till realization thereof.”

- III. Rest of the judgment and award stands confirmed.
- IV. The award be drawn up as per the above modification.
- V. The first appeal No. 2101 of 2012 (The New India Assurance Co Ltd. vs. Usha Radheshyam Jhunhunwala and others) is hereby dismissed with costs.
- VI. The claimant is permitted to withdraw the amount, if deposited by the appellant insurer in this court alongwith accrued interest.
- VII. Both the first appeals are disposed of.
- VIII. Civil application No. 11038 of 2012 is rejected. In so far as civil application No. 14291 of 2016 is concerned, since the appeals are decided on merits, the said civil application is also disposed of.

(V. K. JADHAV, J.)