

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

FIRST APPEAL NO. 3214 OF 2016

SUMANBAI BALAJI GORE
VERSUS
KALYAN SHANKARRAO KALE AND ANOTHER

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Advocate for Appellant : Mr Jogdand Patil Vijay B.
Advocate for Respondents : Mr D.P. Deshpande For R/2
None present for Respondent No.1.

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CORAM : V.K. JADHAV, J.
Dated: March 02, 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, Parbhani dated 29.4.2011 in MACP No. 311/2008, the original claimant has preferred this appeal.
3. Brief facts, giving rise to the present appeal are as follows :-
 - a] on 2.7.2008 the appellant claimant was travelling in a jeep bearing registration No.MH-26/C-4995 from

Parbani to Basmath. On way, near Navodaya Vidyalaya, rear tyre of the jeep was suddenly burst and the driver had lost his control over the jeep. Thus the jeep turned turtled. In consequence of which the claimant sustained injuries on her left hand, and other fractured injuries. She was shifted to Nanded for treatment. The claimant has approached the Tribunal, Parbhani by filing M.A.C.P. No.311 of 2008 for grant of compensation under various heads. It has been contended in the claim petition that, accident took place solely due to rash and negligent driving of the driver of the jeep. On account of the injuries sustained by the claimant in the accident her one finger was required to be removed and she sustained permanent disablement to the extent of 24% as certified by the Orthopedician. She incurred medical expenses to the tune of RS.60,000/- and she has also lost amenities of life. It has been contended that she was doing tailoring work and earning Rs.3,000/- p.m. on account of the aforesaid injuries she lost her total capacity of earning.

b] Respondent no.1 owner has strongly resisted the

claim petition by filing his written statement. According to respondent no.1 he is owner of the jeep which is a Marshal make Mahindra Jeep and it is of a white colour. It is also contended that driver of the said jeep has taken said jeep to workshop for carrying out certain repairs and on way the rear tyre was torn, however, said jeep did not turned turtled. It was halted on the side of the road. It has been contended that accident of another black yellow jeep which was carrying passengers took place near the same school and in that accident the appellant claimant has sustained injuries. According to respondent no1, the claimant has referred colour of the jeep involved in the accident as black yellow and respondent no.2 insurance company has also strongly resisted the claim petition on the similar ground. It has been denied that the claimant was travelling in the jeep owned by respondent no.1 and said jeep met with an accident.

c] The claimant has adduced oral and documentary evidence in support of her contentions and also examined four witnesses. Respondents have not

adduced any oral or documentary evidence.

d] The learned Chairman of the Motor Accident Claims Tribunal, Parbhani by its impugned judgment and award dated 29.4.2011 dismissed the petition on the ground that the claimant has described in the pleadings as well as in the evidence colour of the vehicle involved in the accident as black and yellow jeep and respondent no.1 owner is having a white colour jeep and it is not a black yellow taxi jeep. The learned Chairman of the Tribunal thus disbelieved the entire evidence of the claimant and dismissed the claim petition on this ground alone. Hence this appeal.

4. The learned counsel for the appellant submits that, on the date of accident itself i.e. on 2.7.2008 the concerned police station has recorded the complaint, however, the crime was registered in the concerned police station on 5.7.2008. Learned counsel submits that in the complaint, the claimant has mentioned registration number of the vehicle in which she was travelling and accordingly sustained injuries after the

said vehicle met with an accident. Even though a specific registration number is mentioned in the complaint, the Tribunal has given much importance to the colour of the vehicle mentioned by the claimant who is an illiterate lady and erroneously dismissed the entire claim petition. Learned counsel submits that, on 5.7.2008 concerned police station has drawn spot panchnama in presence of the panchas, witnesses and certified copy of the said spot panchnama is placed on record and marked at exh.35. Even on the date of drawing of the panchnama i.e. on 5.7.2008 said vehicle jeep having same registration number as mentioned in the complaint was lying on the spot of accident and even in the spot panchnama the damage caused to the said vehicle has been mentioned in detail. The Tribunal has ignored the above evidence and erroneously observed that nothing was found on the spot when spot panchnama was drawn. Even, the Tribunal has not given weightage to the fact that registration number of the vehicle involved in the accident was clearly mentioned in the complaint.

5. Learned counsel for the appellant submits that, in the accident left side arm of the claimant was totally crushed and her left hand was totally crushed under the said vehicle and one finger of the left hand was required to cut from the body. She had also sustained 3 to 4 fractured injuries. She has examined witness no.2 Dr Prakash Chavan, witness no.3 Dr. Prakash Dake and witness no.4 Dr. Sanjay Kadam. The claimant has proved medical expenses incurred by her. On account of the injuries sustained in the accident, the claimant sustained permanent disablement to the extent of 24%. Prior to the accident the claimant was doing tailoring work and due to said permanent disablement she would not be able to carry out said tailoring business in future. Thus there is a loss of future income. The claimant was operated in the hospital of witness Dr. Sanjay Kadam. She was hospitalized for a considerable time. The claimant is entitled for compensation for pains and sufferings, loss of amenities in future life and also for future medical treatment. Learned counsel for the appellant claimant submits that, respondent no.1 has not adduced any evidence neither he has examined

himself nor examined his driver who was driving the said jeep at the time of accident.

6. Learned counsel for respondent insurer submits that, the appellant claimant all the while given reference to the black yellow jeep involved in the accident. Learned counsel submits that it is difficult to believe that an illiterate lady can mention registration number of the vehicle in the complaint recorded by the police, however, she would not be able to give/describe the correct colour of the vehicle involved in the accident. Learned counsel submits that, the Tribunal has correctly given weightage to the above facts and dismissed the claim petition on this ground. Learned counsel further submits that, the appellant claimant as per her own version travelling in the said jeep as a fare paying passenger. Said jeep is a private jeep and thus carrying of the passengers on fare is not permissible and risk of those passengers is not covered under the policy. Learned counsel submits that, in case, this court accepts the claim petition, and quashed and set aside the judgment and award passed by the Tribunal,

then respondent insurer is not liable to pay the compensation on account of specified breach of the terms and conditions of the policy as aforesaid.

7. On careful perusal of the pleadings, evidence and judgment and award passed by the Tribunal, it appears that, the appellant claimant has lodged the complaint on the date of accident itself i.e. on 2.7.2008. Her complaint was recorded at Shrinivas Orthopedic Nursing Home where she was admitted after the accident. Immediately, after the accident she was taken to said Hospital. She was travelling in the said vehicle bearing registration No.MH-26/C-4995 and due to burst of the tyre, vehicle turned turtled and accordingly she sustained crush injury on her left arm, left hand and also one finger of her left hand was cut from the body. Obviously, she was under the trauma. Though, she had correctly given registration number of the vehicle involved in the accident, it appears that, she failed to give correct colour of the vehicle involved in the accident. This particular aspect of giving incorrect colour of the vehicle involved in the accident loses its

significance when said vehicle found lying by the road side of the spot of accident where spot panchnama Exh.35 was drawn by the police on 5.7.2008. It has specifically mentioned in the spot panchnama Exh.35 that, jeep bearing registration no. MH-26/C-4995 was lying by the side of the road, one part of the body of the jeep and the rare side of the tyre found in burst condition. It was a marshal company jeep having white colour. Further damage to the door, front glass body etc., also mentioned in the spot panchnama. Though, respondent no.1-owner has taken a different stand in his pleadings, he has failed to lead any evidence to substantiate his pleadings. On the basis of above evidence, it is clear that, the vehicle bearing registration No.MH-26/C-4995 as mentioned in the complaint owned by respondent no.1 was involved in the accident. Thus, I record my findings in the affirmative and hold that the appellant claimant proved that she sustained injuries in the accident in which jeep bearing registration No. MH-26/C-4995 was involved and that the driver of the said jeep has driven the said jeep at the time of accident in rash and negligent manner.

8. The appellant claimant has deposed before the Court that in the said accident, her left arm side totally crushed, left hand crushed and one finger of the left hand was cut from the body. She has also sustained 3-4 fractured injuries. The claimant has examined witness no.2 Dr. Prakash Chavan a treating doctor orthopedician. He has his own hospital named and styled as Shriniwas Orthopaedic Nursing Home, at Nanded. He has deposed that claimant has arrived in his hospital on 2.7.2008, she had injury on her left hand. He further deposed that she had degloving injury with fracture to 3rd, 4th, 5th Metacarpal left hand. Witness Dr. Prakash had fixed the fractures and treatment of debridement to the patient. The claimant was admitted in his hospital till 12.7.2008. Discharge card was issued by him and accordingly the same is taken on record and marked at Exh45. According to him, the appellant claimant will require treatment of plastic surgery in future. He has further deposed that treatment bill was issued by him and he has received a sum of Rs.15,220/- and accordingly, he has issued the receipt about the same. Said receipt is a computerized

receipt marked at Exh.46.

9. The claimant has further examined witness no.3 Dr. Prakash Dake. Witness Dr. Prakash Dake is attached to Civil Hospital, Parbhani. On examination of the claimant, he has issued certificate in Form Comp 'B'. On examination, witness Dr. Dake has noticed that, the claimant had sustained crushed injury on left hand with dorsal aspect with fracture 3rd, 4th, 5th metacarpal of left hand. On examination, left hand wrist loss of dorsiflexion 15% and loss of finger grip of left hand 9%. According to him, total permanent disablement is 24%.

10. The claimant has examined witness no.5 Dr. Sanjay Kadam. According to him, the appellant claimant was admitted in the hospital on 1.8.2008 and discharged on 20.8.2008 and again admitted on 21.8.2008 and discharged on 27.8.2008. He has further explained that the claimant was having crush injury on her left hand and she was operated for the same in the form of abdominal flap. He did two surgeries on her left hand. In his opinion, the claimant is not fully recovered

because she is having stiffness in fingers of her left hand. He has further explained that the claimant will require one more surgery for which the amount of Rs.20,000/- to 25,000/- would be required. Discharge summary issued by him is placed on record and the same is marked at exh.59. Witness Dr. Sanjay Kadam has deposed that he has charged amount of Rs.30,000/- for the aforesaid treatment and he has received said amount and accordingly he had issued said receipt said receipt is shown to him, it bears his signature and the same is marked at exh.60.

11. According to the claimant, she was doing tailoring work prior to the accident. However, except her bare words no evidence is placed on record about her tailoring business. In view of this, the notional income of the claimant can be considered at Rs.3,000/-p.a. and considering the future prospects as per her age the same is required to be considered at Rs.4,000/- p.m. in total. Dr. witness Prakash Dake has admitted in his cross examination that finger of the petitioner can move. He has simply stated that the petitioner will not be able

to work. However, witness Dr. Prakash Dake has not specified the work, which the petitioner would not be able to do. Even witness Dr.Kadam has not given his definite opinion whether the claimant has lost 100% functioning of her left hand. In view of the above, taking into consideration, the nature of the injuries and the resultant permanent disablement, and fact that, the claimant would be able to do other works, loss of the earning capacity is considered at 25%.

12. In foregoing paragraphs monthly income of the appellant claimant is considered at Rs.4,000/-p.m. The appellant claimant was 40 years of age at the time of accident. Though, appellant claimant has claimed her age as 35 years as on the date of accident, in all medical papers her age is mentioned as 40 years. In absence of any age proof, her age is considered as '40' on the date of accident. Thus, the relevant multiplier would be '15'. Thus, loss of future earning is determined on the basis of her monthly income of Rs.4,000/- corresponding to Rs.48,000/-p.a. and loss of earning capacity is considered to the extent of 25% as discussed above.

The appellant claimant is entitled for an amount of Rs.1,80,000/- for loss of future income on account of injuries sustained in the accident with resultant permanent disablement.

13. The claimant is entitled for an amount under medical expenses as per exh.46 Rs.15,220/- and as per Exh.60, Rs.30,000/-. In addition to this, the claimant has produced on record cash memos of the medicines purchased from the medical shop time to time during the course of the treatment. It would not be possible for the claimant to prove each and every cash memo by examining medical shop owner or his representative. It appears from those cash memos that the claimant has incurred expenses of Rs.33,000/- for purchasing the medicines. The claimant is also entitled for the same.

14. The claimant remained hospitalized for a considerable period. She had also undergone operations. The claimant is entitled for an amount of Rs.20,000/- for pains and sufferings and an amount of Rs.20,000/- for loss of amenities in future life. Witness

Dr. Chavan has deposed that the claimant will require treatment of plastic surgery in future. Witness Dr. Sanjay Kadam has also deposed that the claimant will require surgery in future and she will incur Rs.20,000/- to Rs.25,000/- for the same. Thus, considering the expenses for the plastic surgery as well as the further surgery as deposed by Dr.Kadam, the appellant claimant is entitled for an amount of Rs.50,000/- for future medical expenses.

15. The learned counsel for respondent insurer has vehemently submitted that the appellant claimant was travelling in the vehicle involved in the accident as a fare paying passenger and, therefore, there has been breach of the terms and conditions of the policy. The vehicle involved in the accident was a private vehicle and risk of the persons travelling in a private vehicle as a fare paying passenger is not covered under the policy. However, on careful perusal of the pleadings of the respondent insurer, it appears that, said ground was not raised before the Tribunal in the pleadings and consequently, issue was not framed to that effect. Thus,

respondent insurer is not permitted to raise this ground for the first time in the appeal. Respondent insurer ought to have considered all the contingencies and raise the defence accordingly. Thus, respondents are jointly and severally liable to pay the compensation.

16. In view of the above discussion, break up of the compensation under different heads which can be broadly categorized is as under :-

1	Loss of future income	Rs.1,80,000/-
2	Medical expenses	Rs.0,78,220/-
3	Future medical expenses	Rs.0,50,000/-
4	Pains and sufferings	Rs.0,20,000/-
5	Loss of amenities in future	Rs.0,20,000/-
	TOTAL	Rs.3,48,220/-

17. The claimant is entitled for the same alongwith interest @ 9% p.a. from the date of application till realization of the entire amount. The respondents are jointly and severally liable to pay the same. As per the order passed by this Court, the delay in filing the appeal has been condoned with a direction that the appellant claimant shall furnish undertaking that in case compensation is granted to her that she would not claim

the interest from the date of the judgment of the claims Tribunal till 22.8.2016. In view of this, excluding the aforesaid period the claimant is entitled for the interest @ 9% p.a. from the date of application till the judgment and award passed by the Tribunal and from 23.8.2016 till realization of the entire amount. Hence, following order.

O R D E R

- I. First appeal is hereby allowed with costs.
- II. The judgment and award passed by the Chairman, Motor Accident Claims Tribunal, Parbhani dated 29.4.2011 in M.A.C.P. No.311/2008 is hereby quashed and set aside.
- III. M.A.C.P.No.311/2008 is hereby allowed with costs.
- IV. Respondents No.1 and 2 jointly and severally do pay an amount of Rs.3,48,220/- (Rs. Three lacs forty eight thousand two hundred and twenty only) inclusive of amount of compensation under 'No Fault Liability' with interest @ 9% p.a. from the date of application till the judgment and award passed by the Tribunal and from 23.8.2016 till realization of

the entire amount.

- V. Award be drawn up accordingly.
- VI. First appeal is accordingly disposed of.
- VII. The appellant claimant shall pay the deficit court fees within four weeks from the date of this order.

sd/-

(V.K. JADHAV, J.)

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aaa/-