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REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 493 OF 2013**

MAHAVIR SAMPAT KESKAR

Age – 24 years, Occupation-Agriculture &
Driver, R/o.- Keskarwadi, Taluka-Pandharpur,
District-Solapur

... Appellant

~ versus ~

1. SURESH KRISHNAJI DESHPANDE

Age – Adult, Occupation – Business,
R/o. -Bhenda (Bk), Taluka -Newasa,
District – Ahmednagar.

2. DIVISIONAL MANAGER,

United India Insurance Co. Ltd.,
11th Floor, Janata Shopping Centre,
Navi Peth, Solapur.

3. VITTHAL DAGADU LOKARE

Age – Adult, Occupation – Business,
R/o. -Shelve, Taluka- Pandharpur,
District – Solapur

4. DIVISIONAL MANAGER,

Oriental Insurance Co. Ltd. (West),
Mangalwar Peth, Op. Telephone Bhavan,
Chati Galli, Solapur.

...Respondents

APPEARANCES

FOR THE APPELLANT	Mr DW Bhosale.
FOR RESPONDENT NO. 2	Mr Ketan V Joshi.
FOR RESPONDENT NO. 4	Mrs Sucheta D Ghaisas, i/b SS <i>Jinsiwale.</i>

CORAM : **G.S.Patel, J.**

DATED : **9th June 2017**

ORAL JUDGMENT:

1. Admit.

2. By consent, taken up for hearing and final disposal on the basis of the papers on record in the Appeal paper-book and annexed to the Civil Application.

3. The Appeal is directed against an order and judgment dated 29th June 2011 of the Motor Accident Claims Tribunal, Pandharpur. The Appellant (“**Keskar**”) is the original Applicant. In this appeal, he seeks enhancement of the compensation awarded. There were two individuals arrayed as Opponents Nos. 1 and 3 to the claim. Opponents Nos. 2 and 4 were, respectively, the insurers of Opponents Nos. 1 and 3.

4. This is how the matter arises. Opponent No. 1 (“**Deshpande**”) owned a Premier Padmini No. MH-21-B-0074.

This was insured with the United Insurance Co Ltd, Opponent No. 2. Opponent No. 3 (“**Lokare**”) owned an Escort Tractor No. MH-13-J-8695, and this was insured with the Oriental Insurance Co Ltd, Opponent No. 4.

5. On 17th January 2008 at about 10.00 a.m. Keskar, the Applicant, was travelling from Keskarwadi to Bhalvani, Taluka Pandharpur on a motorcycle. Keskar was driving the motorcycle. His friend Rameshwar Chavan (“**Chavan**”) was riding pillion. Keskar claimed he was riding along at a moderate speed, obeying all traffic rules. As they reached the Chandrabhaga Sugar Factory, a tractor with two trailers loaded with sugar cane was approaching from the opposite direction. At the same time, a Premier Padmini motor car, owned by Deshpande, attempted to overtake the tractor. This means that the Padmini and the tractor were both on the same side of the road, and both were in an oncoming direction, i.e., toward Keskar’s motorcycle. As a result of the Padmini’s overtaking manoeuvre, it collided with Keskar’s motorcycle and knocked both down. The tractor could not stop in time. It ran over Keskar’s right leg, fracturing it. Keskar’s friend and fellow traveller Chavan was also injured in his right knee.

6. Keskar’s claim was that the accident was due to the rash driving and negligence of both drivers, i.e., Deshpande driving Premier Padmini, and Lokare was driving the tractor. A crime bearing No. 12/08 was registered by the police, but only against Deshpande, the driver of the Premier Padmini.

7. Keskar was taken to the Sub-District Hospital, Pandharpur. Later that day, he was shifted to Ashwini Sahakari Rugnalaya and Research Center at Solapur. He was hospitalized for 20 to 30 days. His leg had to be operated. Ultimately it was amputated above the knee. Keskar incurred medical expenses of Rs. 2,25,000/- for this surgery and procedure. At the time of the claim, he said he was still undergoing treatment. He also made a claim for mental agony and distress.

8. At the relevant time, Keskar was employed as a driver by one Rajaram Mane (“**Mane**”). Keskar claimed that his salary was Rs 4,000/-, excluding allowances. He also said that it was his ambition to one day own and ply his own vehicle. The disability resulting from this accident rendered him not only jobless but permanently disabled and unable to work or take employment as a driver. Initially, Keskar claimed compensation of Rs. 8,15,000/-. Before the Tribunal he restricted his claim to Rs. 5 lakhs. Deshpande filed his Written Statement at Exhibit 28. He claimed that at the time of the accident it was not Keskar but Chavan who was driving the motorcycle and Keskar was riding pillion. Deshpande said that the tractor in question, being driven by Lokare, abruptly and without warning turned to the right. Keskar’s friend Chavan collided with the tractor and both Keskar and Chavan fell. This was when, according to Deshpande, the collision with his Premier Padmini occurred. Deshpande’s claim was that the accident and injury were, therefore, the result of Keskar’s or, at any rate, his friend Chavan’s negligence. He, therefore, said neither he nor his insurer was liable to pay any amount.

9. Deshpande's insurer, the United India Insurance Co Ltd, Opponent No. 2, also filed Written Statement at Exhibit 20. It denied the injuries and expenses. It also denied the permanent disability. It denied any negligence or rash driving on the part of Deshpande. The insurer also took the plea that it was Keskar and his friend Chavan who were themselves negligent and that no liability or fault could be attributed to either Deshpande or the United India Insurance Co. There was also resistance from Lokare, the driver of the tractor. He filed a Written Statement at Exhibit 21 and pointed out that there was no crime registered against Lokare but only against the driver of Premier Padmini. Oriental Insurance Co supported him by filing its Written Statement below Exhibit 29.

10. Issues were framed at Exhibit 30 and this is how they were cast and answered:

Sr. No.	Issues	Findings
1.	Does the Petitioner prove that he sustained injuries in motor accident that took place on 17.1.2008 at about 1.30 a.m. on Keskarwadi to Bhalvani Road in front of Chandrabhaga Sugar Factor, Bhalvani, Taluka Pandharpur due to rash and negligent driving of motorcycle No. MH-13-Y-9639, Premier Car No. MH-21-B-0074 and Escort Tractor No. MH-13-J-8695 with two trailers bearing No. MH-13-T-1743 by its driver?	Due to rash and negligent driving of opponent No. 1, driver of Premier Padmini car.

Sr. No.	Issues	Findings
2.	Does the Petitioner further prove that he sustained permanent disability due to accidental injuries?	Yes
3.	Whether the Petitioner is entitled to compensation? If so, to what amount and from whom?	Yes, as per final order.
4.	What order?	As per final order.

11. Before the Tribunal, Keskar filed an affidavit in lieu of examination-in-chief at Exhibit 31. He also examined one Mr Virendra Pandurang Chippa, the Deputy Administrative Officer, Ashwini Rugnalaya, Solapur and one Dr Gunwant Ganpatrao Chimanchode. On his part, Deshpande filed his own Affidavit in lieu of examination-in-chief. No other witnesses were led by any of the other Opponents.

12. The evidence of Keskar is broadly in line with the facts set out in the claim. Similarly, Deshpande filed his Affidavit of Evidence reiterating his pleadings in his Written Statement.

13. The Oriental Insurance Company Ltd examined one Dattatraya Dodmini, Deputy RTO who confirmed on oath that the tractor trolley was owned by one Karan Narayan Tathe. The licence issued in respect of the tractor trolley was not for commercial transportation. On this basis, Opponents Nos. 3 and 4, i.e., Lokare and his insurer claimed that they were not liable.

14. Deshpande thus attempted to portray a completely different picture, viz., of the tractor taking an abrupt turn to the right. This was not what either Keskar or the driver of the tractor and his say. Also, an offence was registered only against Deshpande. None of the parties led any independent evidence. In other words, Deshpande and his insurer did nothing whatever to prove their differing version of the facts of the case.

15. The spot panchanama, also referred to by the learned Judge in paragraph 18 of the judgment, shows that what Keskar said is probable. Deshpande contended that it was the motorcycle that first collided with the tractor trailer, and that it was as a result of that collision that the Premier Padmini collided with the motorcycle. This is not borne out by the spot panchanama at all. The evidence indicates that it was the Padmini car that attempted to overtake the tractor, and it was during this overtaking attempt that the car collided with Keskar's motorcycle. It is not possible, therefore, to find fault with the view taken by the learned Judge that the driver of the Premier Padmini was responsible for the accident.

16. The important point to note is that the motorcycle fell to its left and the tractor then passed over Keskar's right leg. This is also consistent with the Keskar's version of events, and inconsistent with Deshpande's version. For, if what Deshpande says is correct, then the motorcycle and the tractor would have had to be proceeding in the same direction with the tractor in front of the motorcycle and the tractor could not then have possibly have passed over Keskar's right leg.

17. As to the question of injuries, there can be no dispute. The evidence of the witness from Ashwini Hospital confirmed that Keskar's right lower limb was crushed and had to be amputated, the surgery being performed by Dr Milind Joshi, an Orthopaedic Surgeon. The medical expenses are also not such as can be called into dispute.

18. The real difficulty appears in paragraph 22 of the impugned order, which reads thus:

"22. On perusal of entire evidence, on record, it appears that due to serious fracture and crush injuries, unfortunately right leg above knee is required to be amputated and Applicant sustained total disability more than 80%. Hence, I answer issue No. 2 in favour of Applicant, holding that Applicant sustained his physical permanent disability to the extent of more than 80%."

19. It is difficult to understand why the learned Judge opted to take the disability at only 80%. In a situation like this, the disability must be assessed on multiple factors. One of these factors must necessarily be the nature of occupation or employment of the injured. A disability cannot correctly be assessed only in terms of a percentage point in relation to the rest of the body, but must be assessed by seeing whether, as a result of that disability, the injured is able at all to perform the job or vocation for which he is trained or in which he is skilled. Now Keskar was demonstrably employed as a driver. With his right leg amputated, his ability to serve as a driver was undoubtedly permanently impaired. He deposed too that he used to drive both motorcycles and vehicles. Neither of these would

be possible any longer. I will ignore the evidence about driving a motorcycle, simply because that is unrelated to employment. Focusing instead on his potential employment or capacity for employment as a driver, the loss of his right leg below the knee would make it impossible for him to take up effective employment.

20. In *Raj Kumar v Ajay Kumar & Anr*,¹ the Supreme Court set out detail principles in assessing loss of earning on account of permanent disability. It also looked at the concept of functional disability and held this to be an operative criterion as distinct from a physical disability. In my understanding, an operative criterion must necessarily mean the criterion that governs in assessing the extent of disability. Paragraphs 13, 14 and 15 of *Raj Kumar* say this:

"13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale

1 (2011) 1 SCC 343.

of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred per cent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical function; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but the head of "loss of future earnings", if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of

expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may."

21. In *Neerupam Mohan Mathur v New India Assurance Company*,² the decision in *Raj Kumar* was referenced and specifically approved in paragraph 11 where the Supreme Court accepted the principle of functional disability as an operative criterion.

22. This is, therefore, the settled law on the subject. The view of the learned Single Judge taking the disability therefore at only 80% is difficult to sustain. There is a functional disability of 100% and that is the only way in which the matter could have been approached.

23. There are two other aspects to be addressed and these relate to income. The first is the question of Keskar's salary. The second is his evidence that he had four acres of irrigated agricultural land in Taluka Pandharpur on which he grew several commercial crops. The Opponents denied his earnings. However, before the Tribunal, Keskar failed to adduce any documentary evidence of his salary. There was no salary slip or certificate annexed and the evidence of his employer was not led. He claimed a monthly income of Rs. 4,000/- from his employment as a driver. The Tribunal took the figure of Rs. 3,000/-. While doing so, despite the fact that this was a permanent disability case and not a fatality case, the Tribunal also made a deduction of one-third towards self expenses.

24. It is my view that in both these approaches the Tribunal fell into error. I am not prepared to accept that in 2008 a driver's

2 (2013) 14 SCC 15.

monthly salary could have been taken at Rs. 3,000/-. The claim admittedly was Rs. 4,000/- and even today I note the opposition on behalf of the contesting Respondent that there is absolutely no evidence before the Trial Court of any income at all. That seems to me to be too extreme an approach to commend itself. One must have regard to what is reasonable and a Court can always in such cases, having regard to the provisions of Section 168, account for what is just compensation. The law on that aspect of the matter is far too well-settled to require repetition or citing of much authority as a general principle, and none before me dispute that either, as indeed they cannot. The question, therefore, is what then could be considered reasonable as the salary of a driver in 2008 for the purposes of computing a compensation claim. This is actually fundamental, because the question of pecuniary damages, leaving aside actual medical expenses and claims for pain and suffering, loss of amenities etc, is dependent on the base that is taken as a monthly salary. If one takes the figure of Rs. 4,000/- per month, this yields only Rs. 48,000/- per year. This would have been Keskar's claim. If one takes what the Tribunal allowed, Rs. 3,000/- per month, then the annual income is only Rs. 36,000/-, which is even less. Assuming for the present that there is no dispute about the multiplier of 18 to be applied, the resultant factor would be a much lower and in my view unjust level of compensation.

25. I think it is reasonable to have taken a figure of Rs. 5,000/- per month as compensation. There may have been many reasons why a driver employed in a taluka place could not readily go through the expenses of summoning the necessary evidence but while considering such cases on equity and justice, Courts charged with

the duty to award just compensation should not, I think, allow themselves to be persuaded towards a figure that is so low as to result in a mere pittance being awarded as compensation. To award just compensation is to make an order that is reasonable. It must not be illusory by being too low, nor should it be fanciful by being too high. Motor Accident Claims are not intended to serve as windfall gains. At the same time when a Claimant has suffered and there is no finding of negligence or contributory negligence, then the resultant award must be one that satisfies the conscience of the Court, and must be just and reasonable. I believe the figure of Rs. 5,000/- per month as his salary and as a base figure meets these criteria, and I propose to use this figure while computing the compensation to be awarded.

26. The finding of a one-third deduction of course cannot survive. There is no basis for that. In fact, *Neerupam Mohan Mathur* says so in terms and in paragraph 5, the Supreme Court had before it a similar case of a permanent disability though of the right hand. The High Court took the loss of earning capacity to 70% but while doing this the Supreme Court confirmed the view taken by the High Court that there could be no deduction towards self expenses. It quoted the High Court:

“Indeed, the deduction itself will be meaningless for unlike a case of death, we need to make provision for his own living as well as the living of persons, who are dependent on the injured person.”

27. If we, therefore, take the figure of Rs. 5,000/- as the salary, this would yield an annual salary of Rs. 60,000/- with a multiplier of

18. The resultant figure would be Rs. 10,80,000/- and for loss of future prospects, adding another 50%, or Rs. 5,40,000/-, would give a figure of Rs. 16,20,000/- excluding the actual medical expenses proved of Rs. 1,57,000/-.

28. As to the non-pecuniary damages, the Tribunal awarded Rs. 1,50,000/- (paragraph 5). The view was that Keskar can walk with a prosthetic, this being the medical advice he received. Yes, Keskar may be able to walk; the question is not that. Walking will not earn him an income. The question is, will he be able to drive? His employment was not on account of his ability to walk, but because of his ability to drive, and that is what needed to be addressed while assessing pecuniary damages. The amount of Rs. 1,50,000/- seems to me to be altogether too low. An amount should have been considered towards pain and suffering. A separate assessment ought to have been made for loss of amenities, and loss of marital prospects. There is also the question of loss of expectation of life in the sense that a disabled person might suffer far greater health issues than one who is otherwise in possession of all faculties unimpaired. Here again the same principles of just compensation must apply. Taking all these factors into account, I would award an amount of Rs. 5,00,000/- as non-pecuniary damages. It may not be necessary or advisable these into break into individual components.

29. The total amount thus would come to Rs. 17,36,367/- plus Rs. 1,57,000/- towards medical expenses. Taking all three heads into account, the total would amount of Rs. 22,77,000/-, i.e., Rs. 1,50,000/- towards actual medical expenses, Rs. 16,20,000/- as pecuniary damages with a base income figure of Rs. 5,000/- per

month and Rs. 5,00,000/- as non-pecuniary damages. Incidentally, this would translate to a monthly income of just over only Rs.13,000 per month, taking an interest rate of 7% per annum, and this is a modest amount on which to expect Keskar to support himself and his family.

30. The amount awarded by the Tribunal was Rs. 3,07,365/- with interest at the rate of 7% per annum. The amount already deposited by the insurer is Rs. 3,83,633/-. This means that the amount payable is Rs. 18,93,367/- and this is the amount that in my view should be fairly awarded as compensation payable by the insurer of the Premier Padmini car, Opponents Nos. 1 and 2, jointly and severally.

31. The only other remaining question is this: the amount that I have indicated is considerably higher than the claim as originally made and, before the Tribunal, Keskar in fact reduced his claim to Rs. 5,00,000/-. Is it then permissible for a Court to take a claim of this kind and then award an amount significantly higher than what was originally claimed? I see no difficulty in doing this if the result is one that is just. There may be any number of reasons why a Claimant before a Tribunal is compelled or advised to make a more modest claim. Perhaps one of the most critical factors in this is the amount of court fee and the attendant expenses involved. It often happens, and I do not believe that the Courts should blind themselves to this reality, that being unable to pay the full amount of court fee, litigants are driven to keeping down the amount of the claim. That should not impede a Court in its primary endeavour, which is to deliver a just result.

32. Lastly as to the question of rate of interest. I believe 7% is not unreasonable. The amount awarded will carry interest at this rate of simple interest of 7% per annum from the date of the claim or application, i.e., 31st May 2008 till payment. The amount deposited by the insurer of Rs. 3,83,633/- is permitted to be withdrawn with all accrued interest. The remaining amount will be deposited within 12 weeks from today. Upon deposit, the Appellant will be entitled to withdraw the amount so deposited.

33. The Appeal is disposed of in these terms. No costs.

(G.S. PATEL, J.)