

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

FIRST APPEAL NO. 885 OF 2007

Vilas S/o Sahebrao Gawali,
Age : 34 years, Occu. Building Contractor,
R/o. Avinash Colony, Shivaji Nagar,
Waluj, Tq. Gangapur, Dist. Aurangabad. Appellant...

Versus

1. Baban Shankar Kadam,
Age : Major, Occu. Driver,
R/o. RH-40-22, AHV Amegh Housing
MIDC, Bajaj Nagar Waluj, Aurangabad.
2. Prakash S/o Shankar Kadam,
Age : Major, Occu. Business,
R/o. RH-40-22, AHV Amegh Housing
MIDC, Bajaj Nagar Waluj, Aurangabad.
3. The Divisional Manager,
United India Insurance Co. &
it's office at Aurangabad. Respondents...

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Mr A. A. Joshi, Advocate for the appellant
Mr S. G. Chapalgaonkar, Advocate for respondent No. 3

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CORAM : A. M. DHAVAL, JJ.

DATE OF RESERVING THE JUDGMENT : 01ST AUGUST, 2018.
DATE OF PRONOUNCING THE JUDGMENT : 16TH AUGUST, 2018

JUDGMENT :-

1. This is an appeal by the original claimant for enhancement of the compensation. In MACP No. 518/2003, learned Member, MACT, by judgment dt. 31.03.2007 awarded compensation of Rs.

2,10,000/- with interest at the rate of 7.5% towards permanent disability sustained by the claimant. By this appeal, the appellant claims enhancement to the tune of Rs. 5,00,000/-.

2. As per the claim petition, on 05.06.2003 at 4:45 am, the claimant was proceeding on his bike towards MIDC, Waluj. That time, Tata Tempo MH20/W-7238 belonging to respondent No. 2 was driven by respondent No. 1 rashly and negligently and it gave dash to the bike causing fracture of leg and head injury to the claimant. The claimant took treatment in Kamalnayan Bajaj Hospital from 05.06.2003 to 30.06.2003 and in Sai Shalaka Brain & Spine Centre, Ahmednagar from 18.07.2003 to 30.07.2003 and was required to incur medical expenses of Rs. 1,50,000/-. He was under the treatment at the time of claim. He claimed that, he was doing business of contractor and was earning Rs. 25,000/- per month. Due to permanent disability sustained by him, he has lost the source of income. Respondent No. 1 driver of the temp has been prosecuted for the offence u/s 338 IPC and other sections.

3. With these pleadings the claimant/respondent No. 1-driver claimed compensation at Rs. 5.00 lakhs. . Respondent No. 1-driver appeared but did not file written statement. Respondent No. 2-owner did not appear in spite of service. The claim proceeded ex-

parte against him. Respondent No. 3-Insurer denied age, income of the deceased and negligence of the respondent and also claimed that respondent No. 1 was not holding effective and valid driving license. The driver and owner of the bike were necessary parties as the bike rider was rash and negligent. The claim is excessive.

4. After the issues were framed, the claimant examined himself and CW2 Dr. Naik, Neuro Surgeon. The learned Member, MAC Tribunal held that respondent No. 1 was rash and negligent and was solely responsible for the accident. Respondent No. 3 failed to prove breach of policy. The claimants has proved only the medical expenses of Rs. 47,451/-. He then considered income tax returns to hold that, the claimant was earning Rs. 8,000/- per month but he granted lump sum Rs. 1,00000/- towards loss of earning. he observed that, the claimant can conduct his work by appointing any assistant. He assessed the total compensation at Rs. 2,10,000/-. Hence this appeal for enhancement.

5. Shri. A. A. Joshi, learned counsel for the claimant/appellant argued that the claimant had sustained 38% physical disability and the said fact has been accepted by the trial Court. The permanent disability certificate is at Exh. 42. However, the claimant has sustained 100% functional disability as he is unable to carry on his

business of contractor. He submitted that, learned trial Judge erred in rejecting the bills of Rs. 53,000/- produced by the claimant. He submitted that the claimant was suffering from headache and giddiness and was unable to conduct his business. The claimant has examined Neuro Surgeon and he has given his opinion. The same should have been followed and the compensation should have been calculated by using multiplier factor method. He also argued for increase in compensation on account of pains and sufferings and loss of amenities and loss of enjoyment and loss of income during treatment.

6. Per contra, Shri. Santosh Chapalgaonkar, learned counsel for respondent No. 3 - Insurance Company argued that the disability certificate Exh. 42 is contrary to the oral evidence of the claimant. The claimant is pleading a case of permanent disability due to effect of head injury causing damage to his brain, whereas; the certificate is regarding disability to the leg. The oral evidence of CW2 is not supported with CT scan reports and specific finding regarding the exact nature of treatment to brain. CW2 Dr. Naik had not brought his hospital record about the claimant. The nature of injury was not disclosed in the discharge card. Mr Chapalgaonkar argued that there was not proper evidence regarding functional disability of the claimant or any disability on account of brain injury. There is no

evidence that the claimant is not in position to do any work after the incident. With respect to quantum, he argued that the medical bills of Rs. 53,000/- were suspicious and no witness is examined to prove them. He argued that, there is no description of the nature of job of the claimant as a contractor. He argued that, the accident has taken place on 05.06.2003 and considering the evidence on record, the learned trial Judge awarded just and reasonable compensation and it needs no interference.

7. Since the liability of respondents No. 1 to 3 to pay the damages on account of 100% rashness and negligence on the part of respondent No. 1 is not disputed by filing any appeal, the only issue is about quantum. But the Insurance Company can challenge any findings which may affect the quantum.

8. The respondents have not examined any witness. The claimant has relied on following document.

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| Exh. 35 | - | Spot panchanama. |
| Exh. 36 | - | Copy of charge-sheet. |
| Exh. 37 | - | Injury certificate issued by Bajaj Hospital. |
| Exh. 38 | - | Driving license of respondent No. 1. |
| Exh. 39 | - | LIC policy. |
| Exh. 40 to 41 | - | Policy. |

- Exh. 42 - Disability certificate.
- Exh. 43 - Disability Certificate dt. 30.06.2003 issued by Kamalnayan Bajaj Hospital.
- Exh. 44 - Discharge Certificate dt. 30.07.2003 of Sai Shalaka Hospital, Ahmednagar.
- Exh. 45 - Admission card of Dr. Anbhule Hospital dt. 28.07.2004.
- Exh. 46 - Discharge Card of Dr. Anbhule Hospital.
- Exh. 48 & 49 - Bills of Dr. Bajaj Hospital.
- Exh. 50 to 52 - Copies of income tax returns.

9. I find substance in the contention of Dr. Chapalgaonkar that the evidence of claimant does not match with the injury certificate. The evidence is about disability on account of brain injury whereas; the certificate is in respect of disability due to injury to left knee. The permanent disability certificate is issued by a private doctor namely; Dr. Prakash Gusrkar. As held in **Raj Kumar vs. Ajay Kumar and another** reported in 2011(2) Mh.L.J. (SC) 569, the certificate issued by a private Doctor cannot be read in evidence without examining the doctor.

12. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give 'ready to use' disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the

genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability.

10. The first medical certificate of Dr. Bajaj Hospital dt. 05.06.2003 shows three minor abrasions, one CLW showing fracture at ankle. Besides there was skull injury showing linear fracture of left occipital, parietal, temporal region. It is also recorded that, brain showed temporal haemorrhage on contusion. The patient was treated indoor only from 05.06.2003 to 01.07.2003.

11. The claimant took treatment in various hospitals as follows:

Sr.No.	Hospital	Period	Discharge Card Exh.	CT Scan Exh.	Bill & Exh.
1	Bajaj Hospital	05.06.2003 to 30.06.2003	Exh. 43	Exh. 48/75, 31, 106	27624/97
2	Sai Shalaka Hospital	18.07.2003 to 30.07.2003	Exh. 44	Exh. 119/94	9800/48/28
3	Dr. Anbhule Hospital	28.07.2004 to 31.07.2004	Exh. 45	----	1050/48/68
4	Anand Rishiji	16.07.2004 to 8/9 OPD	----		605

12. The claimant has filed disability certificate showing disability on account of injury to ankle but has not deposed anything about the same. The doctor who issued the certificate and who had treated him for injury to leg is not examined. There is no malunion or shortening of leg and no x-rays are produced. In case of restriction of movement, it is expected that there should be advice for physiotherapy but no such advice was given. There are no such bills showing that physiotherapy treatment was taken by the claimant. The claimant has not produced a single bill to show that he had purchased a wheel chair, walker or any supporting equipment. In the circumstances, mere marking of the exhibit to the disability certificate issued by private doctor without examining the doctor will not prove disability on account of the injury to the leg. The evidence shows that, almost all the medical bills for the period from 05.06.2003 to 30.07.2003, thereafter there was no subsequent treatment and medication for the injuries. hence, I hold that, the disability to the leg is not proved.

13. The claimant deposed and led oral evidence to show that he had disability on account of brain injury. CW2-Neuro Surgeon-Dr. Naik has deposed that, the deceased was having brain problem and had suffered permanent disability but he has not issued any medical

certificate to that effect. The evidence on record shows that, the claimant was required to take four CT scans, out of which three were when he was in Bajaj Hospital from 05.06.2003 to 30.06.2003 and one CT scan was taken on 18.07.2003 when he was admitted in Sai Sahalaka Hospital. Thereafter, there was no further CT scan. In case of permanent disability, it is necessary that Doctor should wait for sufficient length of time and thereafter necessary CT scan should be taken and then only opinion should be expressed. The evidence on record shows that, after 30.07.2003 there were no major expenses for hospitalization or for medical bills. The discharge card of Sai Shalaka Hospital, and two discharge cards of Dr. Anbhule Hospital do not disclose any permanent disability to the brain. Therefore, the oral evidence of Dr. Naik and the claimant about disability on account of brain injury cannot be believed. As the permanent disability is not proved, the claimant is not entitled for loss of income.

14. The claimant has filed income tax returns for three years showing income and tax as follows.

Sr. No.	Assessment year	Amount (in Rs).	Tax (in Rs.)
1	2000-01	75,450/-	1199/-
2	2001-02	94,660/-	5524/-
3	2002-03	98,740/-	8923/-

15. Considering the evidence on record, I hold that the claimant was entitled for medical reimbursement of Rs. 67,501/-.

16. Besides, he has sustained injuries and was required hospitalization initially for 26 days and thereafter for 13 days and again for 4 days. He must have undergone pains and sufferings and agony due to injuries. I hold that the claimant was entitled for compensation under following heads.

(i) Medical Expenses	-	Rs. 67,501/-
(ii) Loss of income due to injuries for about three months	-	Rs. 22,000/-.
(iii) Pains and sufferings	-	Rs. 50,000/-.

		Rs. 1,39,501/-
(iv) Incidental expenses like transport diet etc. -	-	Rs. 10,000/-

		Rs. 1,49,501/-

17. The trial Judge has awarded compensation of Rs.2,10,000/-. I find no reliable evidence to show loss due to functional disability. Since this is an appeal by the claimants, grant of Rs. 2,10,000/- by the learned trial judge being reasonable, it cannot be enhanced. Since the Insurance Company has not filed counter appeal or cross-objections, there cannot be any issue about reduction of the amount.

18. In the result, the appeal deserves to be dismissed. Hence, the appeal is dismissed. No order as to costs.

[A. M. DHAVALA]
JUDGE