

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

FIRST APPEAL NO. 2764 OF 2009

Shaikh Khaja s/o Sk. Musa Qureshi,
Age : 33 years, Occu.: Driver,
R/o.: Sillekhan, Aurangabad.

Appellant.
(Ori. Claimant)

Versus

The Divisional Controller,
Maharashtra State Road Transport,
Corporation Ltd., M.S.R.T.C.,
Divisional controller Office,
C.B.S. Road, Aurangabad.

Respondent.
(Ori. Respondent)

Mr. Amol Khedkar h/f Mr. P.B. Khedkar, Advocate for the appellant.
Smt. Ranjana D. Reddy, Advocate for respondent.

CORAM : SUNIL K.KOTWAL, J.

Judgment reserved on : 5th December, 2018.

Judgment pronounced on : 14th December, 2018.

JUDGMENT.

1. This appeal is directed by original claimant in M.A.C.P. No. 722 of 2008, for enhancement of the compensation as well as challenging the finding of Tribunal holding contributory negligence of the appellant to the extent of 80%. Respondent is the

Maharashtra State Transport Corporation Limited (hereinafter referred to as "MSRTC").

2. The facts leading to institution of this appeal are that, on 01.01.2008 at about 11.00 a.m., when the claimant was driving Ape-rickshaw bearing No. Mh-20-AT-6697 from Aurangabad towards Kannad, that time in Daulatabad Ghat, S.T. bus bearing No. Mh-20-D-7039 (offending bus) came from opposite directions in high speed and gave dash to the Ape-rickshaw of the claimant by coming to the wrong side of the road, resulting into fracture injury to the right hand of the claimant. In that accident, claimant sustained 12% permanent disability and therefore, he filed claim petition for compensation before the Tribunal.

3. By filing written statement Exh.14, the respondent denied its liability contending that the accident occurred due to rash and negligent driving and adamant attitude of the claimant, who drove his Ape-rickshaw, without leaving sufficient space for the vehicle coming from opposite direction. According to the respondent, the driver of the S. T. bus after applying brakes, took the bus utmost left side of the road.

4. Considering the evidence placed on record, learned

Tribunal held that the accident occurred due to contributory negligence on the part of the claimant to the extent of 80% and responsibility of the driver of the S. T. bus was only to the extent of 20%. The Tribunal awarded compensation of Rs.30,000/- considering the 20% negligence on the part of the S. T. bus driver.

5. Heard Shri. Amol Khedkar, learned counsel for the appellant and Smt. Ranjana D. Reddy, learned counsel for the respondent.

6. Learned counsel for the appellant submits that claimant (PW-1) categorically deposed before the Court that the accident occurred because the S. T. bus came from opposite direction by the wrong side and gave dash to the Ape-rickshaw. He submits that to prove the contributory negligence on the part of the claimant, the S. T. bus driver is not examined by the respondent. According to the learned counsel even in the spot panchanama the Ape-rickshaw is shown on middle of the road and not on wrong side. He submits that position of the vehicle can be changed due to dash from both sides of the Ape-rickshaw.

7. Next contention of learned counsel for the claimant is that the Tribunal did not consider that due to permanent disability

the claimant cannot do the loading and unloading of the articles in the Ape-rickshaw and therefore, he suffered 100% loss of income. He submits that the Tribunal did not award expenses for future medical treatment, though certificate was issued by Dr. Jaiswal (PW-2). He prays for enhancement of the compensation after considering the loss of future prospect and notional income of the claimant at the rate of Rs.6,000/- per month.

8. Learned counsel for the respondent submits that from the spot panchanama, it emerges that the claimant was driving the Ape-rickshaw by the middle portion of the road and therefore, he contributed the occurrence of the accident due to his own negligence. She submits that the monthly income of the claimant considered by the Tribunal is just and proper and there is no need of enhancement of the compensation.

9. Next contention of learned counsel for the respondent is that the claimant was treated at Ghati Hospital, which is Government Hospital, where treatment is given free of costs. Therefore, for future medical expenditure the Tribunal rightly rejected claim of the claimant. She has pointed out that in the cross-examination of Dr. Jaiswal, he has admitted that claimant can

drive rickshaw. She submits that the earning capacity of the claimant cannot be affected due to accidental injuries. Thus, no compensation can be awarded to the claimant.

10. Initially, I have to examine whether the accident occurred due to contributory negligence on the part of the claimant as held by the Tribunal. The claimant Shaikh Khaja (PW-1) stepped into witness box and deposed that when he was proceeding towards Kannad by Ape-rickshaw, that time in Ghat section the S. T. bus came from opposite direction in high speed towards wrong side of the road and gave dash on the front portion of the rickshaw. He claims that in that accident his left hand was fractured. It is to be noted that when this witness was subjected to searching cross-examination by learned counsel for the respondent, he has admitted that police prepared spot panchnama as per situation on the spot. He has also admitted that the contents of map, which is a part of the spot panchanama (Exh.18) are correct. Therefore, when spot panchanama (Exh.18) is examined, it becomes clear that the Ape-rickshaw of the claimant was found on the middle portion of the road facing towards Khultabad and front portion of the Ape-rickshaw was in damaged condition. Even the rear side of the Ape-

rickshaw was in bent condition. One S. T. bus bearing No. Mh-20-D-6421 came on the back side of the rickshaw and the offending bus was found by its extreme left side of the road just touching the parapet wall of the road, facing towards Daulatabad. Even some stones of the parapet were found dislocated. There was damage towards driver side of the bus. Even the map, which is part of the panchanama shows same situation. After careful examination of the map, it becomes more clear that at the time of accident the ape-rickshaw of the claimant was exactly on the middle portion of the road and therefore, the S. T. bus, which came from opposite direction of Ape-rickshaw, was taken by the S. T. bus driver to his extreme left side, which resulted into dislocation of stones of the left parapet wall in the Ghat section. This situation on the spot of the accident certainly shows that at the time of accident, the claimant was driving the Ape-rickshaw by the middle portion of the road without leaving sufficient space on his right side for the vehicle coming from opposite direction. Even in the cross-examination appellant (PW-1), he has admitted that the S. T. bus was just near the parapet wall of the road and the driver had applied brakes. The above referred spot situation together with above admission given by the claimant in his cross-examination, is definitely sufficient to

hold that in the Ghat section the claimant was driving his Ape-rickshaw by the middle portion of the road without leaving sufficient space for the vehicle coming from opposite direction. Therefore, the S. T. bus driver applied brakes and took the bus to the extreme left corner of the road, touching the parapet wall towards Ghat. Thus, certainly, the claimant had contributed the occurrence of the accident by driving his Ape-rickshaw by the middle portion of the road. The accident occurred only because the claimant did not leave sufficient space on the road towards his right side to pass the vehicle coming from opposite direction. Driving the Ape-rickshaw in such a manner in Ghat section by the claimant is certainly sufficient to hold that the accident occurred also due to the negligence on the part of the claimant.

11. Though, the learned counsel for the claimant submits about the change of position of vehicles due to dash given by S. T. bus from both side of the Ape-rickshaw, in the entire evidence claimant nowhere deposed that the position of his Ape-rickshaw was changed due to dash by S. T. bus from front side as well as from back side. In the circumstances, considering the situation on the spot and above referred admissions given by the claimant, even in

absence of examination of the driver of the S. T. bus, only one conclusion is to be drawn that claimant himself contributed at least 80% negligence for occurrence of above said accident. Therefore, the Tribunal rightly held that the claimant has 80% contributory negligence and S.T. bus shared remaining 20% of negligence by driving the respective vehicles on the public highway. I do not find any fault in the above referred finding given by learned Tribunal.

12. The claimant claims that due to accidental injury he sustained 100% loss of earning capacity. In **Rajkumar Vs. Ajay Kumar and another, [2011(2) Mh.L.J. 569]**, while considering the claim for compensation in injury cases, the Apex Court summarized the principles regarding assessment of loss of earning capacity as follows :

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability)

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the

extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentage of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

13. Thus, it is clear that percentage of permanent disability cannot be assumed to be percentage of loss of earning capacity. The loss of earning capacity of claimant, due to permanent disability is to be assessed after considering the medical evidence, occupation of the claimant and effect of permanent disability on his earning capacity. In the same case, the Apex Court cautioned the Tribunals when 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. Therefore, when the evidence of Dr. Jaiswal (PW-2) is scrutinized, it emerges that though Dr. Jaiswal has proved disability certificate showing 12% permanent disability (Exh.43). From his cross-examination, it emerges that he was not the person, who treated the injured after occurrence of the accident. On the other hand, the claimant approached this doctor for the first time on 11.02.2009.

14. Dr. Jaiswal (PW-2) has admitted in his cross-examination that he did not get fresh X-ray of the patient on that day and he did not carry out special tests for assessing disability. From his cross-examination, it emerges that he issued disability certificate only on the basis of external examination, discharge card, X-ray plates and other documents shown by the claimant. Thus, it becomes clear that Dr. Jaiswal (PW-2) most casually issued the permanent disability certificate even without obtaining X-ray to ascertain the stage of union of bone of the claimant. Therefore, this medical witness cannot opine regarding healing of the orthopedic injury. Even this witness has not taken pains to opine whether the permanent disability of 12% pertains to only left hand or it is in reference with the whole body of the claimant. Thus, I am doubtful regarding the reliability of injury certificate Exh.43 issued by Dr. Jaiswal.

15. Another important aspect is that though Dr. Jaiswal (PW-2) opined that heavy work like loading and unloading would not be possible for the claimant, in his cross-examination he has admitted that he does not have any idea of scale or quantum of loading unloading work of claimant. When this witness had not

idea as to what weight claimant has to load and unload in the Ape-rickshaw, he cant not opine whether after sustaining accidental injuries, claimant would able to load and unload any article in the rickshaw or not. Most important admission given by Dr. Jaiswal is that the claimant can drive vehicle in such condition. Thus, I have no hesitation to hold that the evidence of Dr. Jaiswal (PW-2) falls short to establish that due to accidental injuries the claimant has become incapable to load or unload the heavy articles in the Ape-rickshaw. Assuming that claimant is unable to loading and unloading of heavy goods in the Ape-rickshaw, even then as he can drive the auto-rickshaw, he can continue his occupation as driver by driving passenger rickshaw or any other four-wheeler. In the circumstances, I have no hesitation to hold that the claimant miserably failed to prove that due to the accidental injuries, he has lost his earning capacity in any manner, for the reason of any permanent disability. Thus, the claimant is not entitled to compensation under the head of loss of future income.

16. However, it can not be ignored that from the discharge card Exh.20, it emerges that after the accident, claimant was admitted in Ghati Hospital on 02.08.2008 and he was discharged on

05.08.2008. He was diagnosed for left hand humerus bone fracture. Thereafter again he was admitted in the same Hospital on 1st September, 2008. After surgery, he was discharged on 23rd September, 2008. Thus, the claimant was hospitalised for a period of 26 days.

17. Considering the occupation of claimant as driver, his notional income needs to be considered as Rs.6,000/- per month. The driving license Exh.23 shows that his date of birth is 2nd May, 1975. Thus, on the date of accident, he was 33 years old person. However, claimant cannot prove that he has lost earning capacity due to accidental injuries, 40% income cannot be added under the head of loss of future prospect. Thus, the monthly income of the claimant cannot be considered as more than Rs.6,000/-. His per day income is Rs.200/-. As claimant was hospitalized for 26 days, certainly during this period, he has lost his daily income. Thus, the claimant is entitled to compensation of Rs.5,200/- under the head of compensation during the period of hospitalization.

18. In addition to this, the claimant has filed bills of medicines, worth Rs.1,634/-. Therefore, he is entitled to compensation of Rs.1,634/- under the head of medical expenditure.

19. As the claimant was hospitalized for 26 days, somebody would have attended him in the hospital for 26 days. Considering the attendant charges at the rate of Rs.500/- per day, the claimant is also entitled to Rs.13,000/- under the head of attendant charges.

20. As opined by Dr. Jaiswal (PW-2) for removal of steel rod from the left hand of the claimant in future, medical expenses of Rs.20,000/- would be required. Therefore, under the head of future medical expenditure, compensation of Rs.20,000/- deserves to be awarded. The claimant cannot be compelled to approach Ghati Hospital for removal of steel rod.

21. In addition to this, considering the the fracture injury sustained by the claimant, under the head of pain suffering and trauma, the claimant is entitled to compensation of Rs.50,000/-.

22. As opined by Dr. Jaiswal (PW-2), the claimant is unable to move his left hand in normal manner. Therefore, under the head of loss of amenities, at the most the claimant is entitled to compensation of Rs.50,000/-. Thus, total compensation payable to the claimant is Rs.1,40,000/-.

23. The Tribunal assessed total compensation to the tune of Rs.1,44,000/- and after considering 20% liability of respondent,

awarded compensation of Rs.30,000/-. Thus, I am fully satisfied that the award passed by the Tribunal awarding compensation of Rs.30,000/- is just and proper and needs no interference.

24. Before parting with the judgment, I must make it clear that the case of **Kaladevi Vs. Bhagwandas Chauhan, [2014 (4) T.A.C. 673 (S.C.)]** as distinguishable on the facts that in that case deceased was driver of H. P. vehicle. Therefore, his income was considered as Rs.9,000/- per month. Accordingly, in view of above discussion, this appeal deserves to be dismissed. First Appeal No. 2764 of 2009 is dismissed. Civil Application No. 4385 of 2010 for fixing the date of hearing, is disposed of. Parties to bear their respective costs of the appeal.

(**SUNIL K. KOTWAL**)
JUDGE

vsm/