IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.2617 OF 2010

Asaram s/o. Megha Rathod,
Age: 32, Occu:Driver
R/o. Watoor Phata, Tq. Partur
Dist:Jalna. .. **APPELLANT**
(Orig.Res.No.1)

VERSUS

1. The New India Assurance Company Ltd. Jalna Branch Jalna, through its Branch Manager, Branch Office near Bus Stand, Jalna Dist: Jalna.

2. Hiraman s/o. Uttamrao Adhe, Age: 35 Yrs. Occ:Labor, R/o. Watoor Tanda, Tq. Partur, Dist:Jalna. .. **RESPONDENTS**
(Res.No.1 is orig.res.no.2 & Res.No.2 is orig.claimant)

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Shri Vaibhav B.Kulkarni, Advocate holding for Shri G.B.Kulkarni, Advocate for the appellant.
Shri Dhananjay Deshpande, Advocate for respondent No.1.
Shri J.C.Badve, Advocate for respondent No.2.

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WITH
FIRST APPEAL NO.87 OF 2011

Hiraman s/o. Uttam Adhe
age 31 years Occu. Labour
R/o. Watur Tanda
Taluka Partur District Jalna .. **APPELLANT**
(Orig.claimant)

VERSUS

1. Asaram s/o. Medha Rathod,
   Age major, Occu. Business
   R/o. Watur Tanda
   Taluka Partur Dist. Jalna.

2. The New India Assurance Co.Ltd.
   Branch at Jalna,
   office near Bus Stand, Jalna.

.. **RESPONDENTS**
(Orig.respdts.No.1 & 2)

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Shri J.C.Badve, Advocate for the appellant.
Shri Vaibhav B. Kulkarni, Advocate holding for Shri G.B.Kulkarni, Advocate for respondent No.1.
Shri V.R.Mundada, Advocate for respondent No.2.

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CORAM : P.R.BORA,J.
DATE : 03.10.2018

ORAL JUDGMENT:

1. Since both the Appeals are arising out of the same judgment and award passed by the Motor Accident Claims Tribunal at Jalna in MACP No.46/2009, decided on 3rd September, 2010, I have heard common arguments in both the Appeals and I deem it appropriate to decide these Appeals by the common reasoning.

2. First Appeal No.2617 of 2010 is filed by the original respondent no.1 i.e. owner of the offending vehicle, whereas First Appeal No.87/2011 is filed by the original claimant, seeking enhancement in the amount of compensation awarded by the Tribunal.

3. The appellant in First Appeal No. 87/2011 had filed aforesaid Claim Petition seeking compensation on account of injuries caused to him in a vehicular accident happened on 25th April, 2008, having involvement of the rickshaw bearing registration No.MH-21-1341 owned by the appellant in First Appeal No.2617/2010 and insured with the New India Assurance Company Limited, which is respondent no.2 in both the Appeals. The appellant in First Appeal No. 87/2011 (herein after referred as the 'claimant') was traveling by offending rickshaw and it turned turtle. In the accident so happened, the claimant was

injured and suffered major injuries to his right eye. The claimant also suffered injuries to his hand and his two teeth were broken. It was the case of the claimant that the accident happened because of negligence on the part of the Driver of the Auto-rickshaw, by which he was traveling at the relevant time. It was his further contention that because of the injuries caused to him in the alleged accident, he was subjected to undergo long medical treatment and to incur huge medical expenses. It was also his contention that he incurred 30% permanent disablement because of the injuries sustained to him in the alleged accident. It was also contended by him that because of injuries caused to him in the alleged accident and permanent disablement incurred by him, he has lost his earning capacity substantially. The claimant was of the age of 34 years on the date of accident and as stated by him in his

Petition, he was earning Rs.4500/- per month from the labour work. The claimant had, therefore, claimed compensation of Rs.5 lakh from the owner and the insurer of the offending Auto-rickshaw.

4. The owner of the Auto-rickshaw was duly served and caused appearance in the matter, however, did not file written statement and hence the Petition proceeded without his written statement. The Insurance Company has resisted the Petition on various grounds including that of the breach of policy conditions by the insured, exonerating insurance company from its liability to indemnify him. The age as well as income and the percentage of disablement were also disputed by the Insurance Company.

5. In order to substantiate the contentions raised in the Petition, the claimant deposed before the Court and filed

on record relevant police papers pertaining to the accident in question as well as all the Hospital, Medical Bills and disability certificate issued in his favour. The learned Tribunal, after having assessed oral as well as documentary evidence brought on record before it, held the claimant entitled for the compensation of Rs.99,839/- and held the owner of the Auto-rickshaw liable to pay the said amount. The Tribunal exonerated the insurance company from its liability holding that it has sufficiently proved the breach of the policy conditions by the insured.

6. Aggrieved by the decision so rendered by the Tribunal, both the owner as well as the claimant have preferred Appeals as noted herein above.

7. Shri Kulkarni, learned counsel appearing for the appellant in First Appeal

No.2617/2010 assailed the impugned judgment on various grounds. The learned counsel submitted that the Tribunal has grossly erred in exonerating the insurance company from its liability to indemnify the appellant. The learned counsel submitted that since the plea of breach of the policy conditions was raised by the insurance company, the same must have been substantiated by adducing positive evidence therefor. The learned counsel submitted that the insurance company admittedly did not adduce any evidence. The learned counsel further submitted that at the relevant time only one passenger was found in excess of numbers permitted in the permit. The learned counsel submitted that as per the permit, three passengers in addition to Driver were permitted to be carried through the said vehicle; whereas at the relevant time there were four persons travelling from the said rickshaw along with the Driver of the auto-rickshaw. Learned counsel submitted that thus, only one passenger was in excess and the said passenger only has received some injuries and has filed present Claim Petition.

8. The learned counsel further submitted that except that passenger, no one else received any injury in the alleged accident. In the circumstances, according to the learned counsel, the insurance company could not have been exonerated from its liability to indemnify the insured to the extent of three passengers, whose risk was covered. The learned counsel relied upon the judgment of the Hon'ble Apex Court in the case of ***United India Insurance Co.Ltd. Vs. K.M.Poonam and others reported in 2011 AIR (SCW) 2802***. The learned counsel invited my attention to para no. 24 of the said judgment, which reads thus:

"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy

> *continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."*

9. The learned counsel submitted that the facts of the present case are much identical to the facts, which were involved in the above case before the Hon'ble Apex Court. The learned counsel submitted that in the said case also the Supreme Court had held

the insurance company responsible for the payment of compensation to the number of persons as were validly permitted to travel from the said vehicle. The learned counsel submitted that in the present case the risk of three passengers travelling through the offending rickshaw was covered by the insurance policy and only one person was insured and he had filed Claim Petition. Considering the facts as aforesaid, according to the learned counsel, the insurance company was liable to indemnify the insured in the present case.

10. The learned counsel further submitted that this Court [Coram : S.V.Gangapurwala, J.] in First Appeal No. 433/2012, decided on 5th March, 2013, relying upon the judgment of the Hon'ble Apex Court in the case of ***United India Insurance Co.Ltd. Vs. K.M.Poonam and others*** (supra) has allowed the Appeal filed by the owner and held the

insurance company liable jointly and severally to pay the amount of compensation along with the owner. The learned counsel submitted that in the aforesaid matter decided by this Court, the vehicle involved was also an auto-rickshaw. The learned counsel submitted that having regard to the law laid down by the Hon'ble Apex Court, which has been followed in the aforesaid matter by this Court, the present appeal filed by the appellant i.e. owner of the offending vehicle, deserves to be allowed and the insurance company requires to be held jointly and severally liable to pay the amount of compensation to the claimant.

11. Shri Dhananjay Deshpande, learned counsel appearing for respondent – insurance company resisted the submissions made on behalf of the appellant-owner. The learned counsel submitted that the judgments relied upon by the appellant are distinguishable so

far as facts involved in the present matter are concerned. The learned counsel submitted that in the matter before the Hon'ble Supreme Court in the case of ***United India Insurance Co. Ltd. Vs. K.M.Poonam and others*** (supra), the vehicle was a jeep carrying passengers; whereas in the present case vehicle is auto-rickshaw. Further distinguishable factor according to the learned counsel is that in the case in hand the owner of the auto-rickshaw himself was driving the said auto-rickshaw. The learned counsel further contended that the owner of the auto-rickshaw was well aware that he cannot carry more than three passengers through auto-rickshaw, which was owned by him and was also being driven by him at the relevant time.

12. The learned counsel submitted that the very cause for occurrence of the accident in question is excess number of passengers travelling in the offending vehicle. The

learned counsel submitted that this aspect need has not been considered in the case of ***United India Insurance Co. Ltd. Vs. K.M.Poonam and others*** (supra) as in the said case vehicle involved was different. The learned counsel further submitted that considering the distinguishable facts and more particularly having regard to the fact that the owner himself was driving the auto-rickshaw and cause for occurrence of the alleged accident is excess number of passengers travelling in the said rickshaw, no liability can be fastened upon the insurance company in the accident in question.

13. I have given due consideration to the submissions made by the learned counsel appearing for the owner of the offending auto-rickshaw and the insurance company with which the said auto-rickshaw was insured. I have perused the impugned judgment as well as

the evidence brought on record. I have also perused the judgments, which are relied upon by the learned counsel appearing for the appellant. Though the learned counsel appearing for the insurance company was persuasive in his submission that the accident in question happened because of the excess number of passengers, I find it difficult to agree with the argument so made. From the evidence on record, it is difficult to reach to any such conclusion that the same was the reason for occurrence of the accident in question. Though it is true that no other vehicle is involved in the alleged accident and it happened because the auto-rickshaw turned turtle, in absence of any cogent and sufficient evidence leading to the unambiguous conclusion that excess number of passenger was the only cause for occurrence of accident, I am not able to accept the argument advanced by Shri Deshpande learned counsel appearing for the respondent – insurance company.

14. From the observations made and the finding recorded by the Hon'ble Apex Court in the case of ***United India Insurance Co. Ltd. Vs. K.M.Poonam and others*** (supra), there remains no doubt that the Hon'ble Apex Court has held liable the insurance company to the extent of number of passengers, which can be validly carried through the offending vehicle. In the instant matter, admittedly the offending auto rickshaw was having permit for carrying three passengers through it and at the relevant time one passenger was in excess i.e. total four passengers were travelling. It is not in dispute that only one was injured in the accident so happened and he only preferred Claim Petition against the owner and insurer of the auto-rickshaw. In the circumstances, it appears to me that the law laid down by the Hon'ble Apex Court

in the case of ***United India Insurance Co. Ltd. Vs. K.M.Poonam and others*** (supra) would squarely apply to the facts of the present case also.

15. This Court in First Appeal No. 433/2012 has taken the same view, relying upon the judgment of the Hon'ble Apex Court in the case of ***United India Insurance Co. Ltd. Vs. K.M.Poonam and others*** (supra). In the said matter, admittedly the offending vehicle was an auto-rickshaw. In the circumstances, the order passed by the Tribunal exonerating the insurance company from its liability to indemnify the insured, deserves to be set aside and quashed. Secondly, the insurance company needs to be held jointly and severally liable to pay the amount of award, which may be passed ultimately in the Claim Petition.

16. About the another Petition filed by

the original claimant, according to the learned counsel appearing for the claimant, the Tribunal has grossly erred in determining the amount of compensation payable to the claimant. The learned counsel submitted that though there was a certificate on record and the claimant himself has testified before the Tribunal that he has incurred 30% disability because of the injuries caused to him in the alleged accident, without any cogent reason, the Tribunal, on its own, had assessed permanent disability only to the extent of 15% and has accordingly calculated the amount of compensation.

17. The learned counsel further submitted that the Tribunal has also manifestly erred in deducting 1/3rd income of the claimant towards personal expenses while determining the amount of compensation. The learned counsel submitted that since the claimant himself is an injured person, there

was no question of deducting any amount muchless 1/3rd of it towards the personal expenses. The learned counsel further submitted that the amount as awarded by the Tribunal towards transportation charges and diet etc. is also unjust and inadequate. The learned counsel further submitted that the Tribunal has also not considered the future prospects of the claimant and has not awarded any compensation to the appellant–claimant towards pain and sufferings, loss of expectation of life etc. The learned counsel, in the circumstances, prayed for adequate enhancement in the amount of compensation.

18. The Tribunal has awarded total compensation of Rs.99,839/- as against the claim made by the claimant of Rs.5 lakh. The total amount of compensation awarded by the Tribunal is as under:

01.	Loss of earning capacity	Rs.61,200/-
02.	Expenses of medical treatment	Rs.34,139/-
03.	Transportation charges	Rs.01,500/-
04.	Expenses for special diet	Rs.03,000/-
	Total	Rs.99,839/-

19. The learned counsel appearing for the owner as well as the insurance company both have supported the impugned judgment in so far as the amount of compensation determined by the Tribunal. The learned counsel submitted that the Tribunal, on the basis of evidence on record, has correctly determined the amount of compensation and no enhancement is warranted.

20. In so far as medical expenses are concerned, the learned counsel submitted that the claimant did produce on record the bills towards medical expenses of Rs.34,139/- and accordingly the said entire amount has been awarded by the Tribunal. Therefore, the

learned counsel do not have any grievance for the compensation awarded under the said head. However, the learned counsel disputed the amount of compensation as has been determined by the Tribunal under other heads.

21. At the outset, it has to be noted that the Tribunal has definitely erred in deducting 1/3rd amount towards personal expenses of the claimant while determining the amount of compensation. As is contended by the claimant, at the relevant time, he was aged about 34 years and used to earn Rs.4500/- per month. The learned counsel submitted that the same income must have been considered by the Tribunal while assessing the amount of compensation. The Tribunal has calculated the amount of compensation on the basis of notional income. Admittedly, no documentary evidence has been placed on record by the appellant–claimant in respect of his income. In the circumstances, it does

not appear to me that the Tribunal has committed any error in holding the income of the claimant notionally at the rate of Rs.3000/- per month.

22. Though it is the contention of the claimant that he incurred 30% permanent disability, admittedly, he did not examine Medical Officer or Expert or Consultant, who has issued the said certificate. It would have been in the interest of claimant to examine the said person so as to bring the first hand information about permanent disablement on record.

23. I have perused the disability certificate. From the contents of the said certificate, it is difficult to record a conclusion that the permanent disability as has been certified by the concerned Doctor is in fact incurred by the claimant and the permanent disability certified in the said

certificate of the body as a whole or limited to a particular limb to which the injury was caused i.e. to his eye. Having considered the nature of the injury, it can be reasonably inferred that the disability certified by the concerned Medical Officer as 30% is disability incurred relating to right eye and not of the whole body. This aspect has been considered by the Tribunal. Though there is much discussion in this regard, the Tribunal has held the percentage of permanent disability incurred by the claimant, only to the extent of 15%. It does not appear to me that the Tribunal has committed any wrong in reaching to the said conclusion.

24. The loss in the future income of the claimant, thus, will have to be assessed on the basis of the proved disability to the extent of 15% as determined by the Tribunal. The Tribunal has held the income of the appellant–claimant to the tune of Rs.3,000/-

per month, which annually comes to Rs.36,000/-, of which 15% would be the loss in his future income, which annually comes to Rs.5400/-. Having regard to the age of the appellant–claimant multiplier of 17 would be applicable. By applying the said multiplier, the amount of compensation payable towards future loss of income comes to Rs.91,800/-. The Tribunal has awarded the compensation of Rs.61,200/- under the said head. The said amount, therefore, needs to be enhanced to Rs.91,800/-.

25. It further appears to me that the Tribunal has committed an error in not awarding any compensation to the claimant towards pain and sufferings, loss of amenities in life, etc. It is not in dispute that the injury caused to the right eye of the claimant during the accident, has materially affected his capacity of working to some extent and he may not be able to

enjoy the amenities of life as a normal person. It appears to me that the consolidated sum of Rs.50,000/- will be just and fair compensation towards pain and sufferings and loss of amenities in life.

26. The appellant – claimant is, thus, found entitled to the compensation, as follows:

01.	Medical expenses	Rs.34,139/-
02.	Transportation charges	Rs.01,500/-
03.	Expenses for Special diet	Rs.03,000/-
04.	Loss of earning capacity	Rs.91,800/-
05.	The pain & sufferings & loss of amenities in life	Rs.50,000/-
	Total	Rs.1,80,439/-

27. Considering the facts of the present case, it appears to me that this will be the just and fair compensation payable to the claimant. In view of the finding recorded by me herein above, the insurance company is jointly and severally liable to pay the entire amount of compensation along with

insured. It was pointed out by the learned counsel appearing for the owner of the vehicle during the course of his argument that the owner has deposited the amount of Rs.25,000/- as statutory amount and has also deposited amount of Rs.25,000/- vide order passed by this Court on 16th December, 2010. It is also brought to my notice that both the aforesaid amounts i.e. totalling Rs.50,000/- are permitted to be withdrawn by the original claimant. In view of the fact that the insurance company now is held liable to indemnify the insured, it would be open for the owner to recover the said amount from the insurance company. In the result, the following order is passed:

ORDER

FIRST APPEAL NO.2617 OF 2010

i] The impugned order so far as it exonerates the Insurance Company from its liability to jointly and severally pay the amount of compensation along with insured, is quashed and set aside. The Insurance Company is held liable to jointly and severally pay the amount of compensation to the claimant.

ii] The appellant is entitled to recover the amount of Rs.50,000/- deposited by him in this Court in the present Appeal from respondent no.1 Insurance Company.

iii] The First Appeal is, thus, allowed in the aforesaid terms.

FIRST APPEAL NO.87 OF 2011

i] The appellant – claimant is held entitled for the enhanced compensation of Rs.80,600/-.

ii] The respondent nos.1 and 2 shall jointly and severally pay the enhanced amount of compensation to the appellant – claimant with interest thereon at the rate of 9% p.a.

from the date of filing of the Appeal till its realization.

iii] The First Appeal, thus, stands partly allowed in the aforesaid terms.

. Pending Civil Application, if any, stands disposed of.

[P.R.BORA]
JUDGE

DDC