IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

BENCH AT AURANGABAD

FIRST APPAL NO. 4669 OF 2017

Babasaheb s/o Laxman Bade,
Age; 42 years, Occupation; Nil,
Resident of Kokangaon,
Taluka; Sangamner,
District; Ahmednagar **APPELLANT**
(Original Claimant)

VERSUS

1) Hanumanta B. Jondhale,
Age; Major, Occupation; Business,
Resident of Kokangaon,
Taluka; Sangamner,
District; Ahmednagar.

2) The Original Insurance Company Ltd.,
Banch; Sangamner, Taluka Sangamner,
District; Ahmednagar. **RESPONDENTS**
(Original Respondents)

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Shri. A.Z. Gandhi, Advocate for Appellant
Shri A.G. Kanade, Advocate for Respondent No. 1
Shri. K.N. Shermale, Advocate for Respondent No. 2

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CORAM : SUNIL K. KOTWAL, J.

Date of Reserving Judgment : 03.10.2018

Date of Pronouncing Judgment : 08.10.2018

J U D G M E N T :

This appeal is directed by the original claimant against the judgment and award passed by the Motor Accident Claims Tribunal, Sangamner (hereinafter referred to as “MACT”) in Motor

Accident Claim Petition No. 99 of 2007 (in short “MACP”), dismissing the claim petition in to to. Respondent No. 1 is the registered owner of the offending vehicle and respondent No. 2 is the insurer.

2. Facts, leading to the institution of this appeal, in brief, are that on 29.4.2006 at about 7.15 a.m. when the appellant/claimant was driving Pickup Van bearing No. MH-14-V-3785 from Kokangaon towards Rahuri, at Loni near Chitralaya, offending Van turn turtled due to burst of rear tyre and breakage of its clamps. In that accident the claimant sustained injuries resulting into permanent disability, therefore, the claim petition was filed before the Tribunal under Section 166 of the Motor Vehicles Act, 1988.

3. The Tribunal held that the accident took place due to rash and negligent driving by the appellant/claimant and not due to the mechanical fault of the offending vehicle. In the result, the claim petition was dismissed.

4. Learned counsel for the claimant/appellant submits that though FIR and the spot panchanama clearly indicate that accident occurred due to burst of the rear tyre of the Pickup Van and breakage of clamps, the Tribunal erroneously dismissed the petition on the ground that the Tempo was over loaded and due to rash and

negligent driving by the appellant/claimant the accident occurred.

5. The next contention of the learned counsel for the appellant is that due to permanent disability the appellant/claimant is not able to drive four wheeler vehicle and there is 100% loss of income due to permanent disability. He prays for grant of enhancement of compensation than assessed by the Tribunal. The learned counsel for the Appellant/Claimant has drawn my attention to the case law of **"Jitendra Kumar vs Oriental Insurance Co. Ltd. And another"[Supreme Court Motor Accident Judgments 243].**

6. The learned counsel for the respondent Insurance Company submits that accident occurred due to rash and negligent driving by the Appellant/Claimant as held by the Tribunal on the basis of copies of police papers filed before the Tribunal. He submits that compensation assessed by the Tribunal need not be enhanced.

7. After going through the judgment passed by the Tribunal, it emerges that the Tribunal held that the Pickup Van was over loaded by the appellant/claimant and because the Appellant/Claimant drove the Pickup Van without observing the condition of the road and one of the tyre burst and clamps of the Pickup Van were broken, resulting into the said accident. The Tribunal held that due to rash and negligent driving by the

Claimant/appellant the rear tyre burst.

8. However, the learned Tribunal failed to consider that in the written statement (Exh. 14) the Insurance Company has nowhere taken defence that the accident occurred because the Pickup Van was over loaded. In the entire written statement (Exh. 14), no defence is taken by the Insurance Company that the Appellant/Claimant was driving the Pickup Van in rash and negligent manner, which resulted into bursting of the tyre and breakage of the clamps. Even the spot panchanama (Exh. 27) does not indicate that the Pickup Van was over loaded. The spot panchanama shows that rear tyre of the Pickup Van was burst and two clamps were broken. Thus, it appears that though no evidence was brought on record by the Insurance Company to prove that the accident occurred due to rash and negligent driving by the Claimant, the Tribunal has made out imaginary case that because the Pickup Van was over loaded and due to that the rear tyre burst and the Pickup Van turn turtled. On the other hand, bursting of the tyre and breakage of the clamps are the sudden mechanical defects, which resulted into occurrence of the accident. The claimant/appellant cannot be connected with sudden burst of the rear tyre which resulted into turning over the Pickup Van. Thus, the claimant/appellant cannot be blamed for the occurrence of the above said accident which resulted into the grave injuries to the claimant/appellant.

9. On the other hand, the claimant/appellant Babasaheb (PW 1) categorically deposed on oath that due to sudden burst of rear tyre, the clamps of the Pickup Van were broken and it turned turtle. In the cross-examination of the claimant/appellant (PW 1), he stood constant and nothing could be elicited to dis-believe his oral version which is also corroborated by the spot panchanama (Exh. 14). I hold that the claimant/appellant has duly proved that the above said motor vehicular accident occurred due to sudden mechanical defect in the Pickup Van and sudden burst of the rear tyre and the claimant/appellant is not responsible for the occurrence of the said accident.

10. The policy of the insurance (Exh. 30) of the offending vehicle shows that it is a package policy for the goods carrying vehicle which covers the risk of the driver also. Therefore, if the claimant/appellant can establish that in the above said accident he sustained permanent disability which resulted into loss of his income, certainly the claimant/appellant will be entitled for the compensation amount.

11. By examining Dr. Nehulkar (PW 2), the claimant/appellant has proved permanent disability certificate (Exh. 37) which shows that the claimant/appellant sustained 30% permanent disability resulting into difficulty in driving four wheeler

vehicle and for lifting the articles. When Doctor Nehulkar (PW 2) has deposed that the claimant/appellant has difficulty in driving. This witness has also proved the bills of Rs. 17,900/- charged by him (Exh. 36). Despite searching cross-examination, nothing could be elicited in the cross-examination of Doctor Nehulkar to disbelieve his version. Thus, I have no hesitation to hold that on account of fracture of radius with dislocation of distal radio ulna joint, the Claimant/appellant sustained 30% permanent disability which resulted into loss of his driving capacity.

12. According to the claimant/appellant (PW 1) he used to draw salary of Rs. 6,000/- per month as driver and after accident he lost that income.

13. In **"Raj Kumar Vs Ajay Kumar and another" [2011 (2) Mh. L.J. 569]**, the Apex Court held that in the matters of personal injury, compensation shall be awarded under following heads :

Pecuniary damages (Special Damages) :-

i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing, food and miscellaneous expenditure.

ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

a) Loss of earning during the period of treatment;

b) Loss of future earnings on account of permanent disability.

iii) Future medical expenses.

Non pecuniary damages (General Damages) :-

iv) Damages for pain, suffering and trauma as a consequence of the injuries.

v) Loss of amenities (and/or loss of prospects of marriage).

vi) Loss of expectation of life (shortening of normal longevity).

In the same case the Apex Court also ruled that :

> "Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity. "

14. In the case at hand, Doctor Nehulkar (PW 2) has proved that due to 30% permanent disability sustained by the claimant/appellant, he has difficulty in driving the vehicle. No doubt, Doctor Nehulkar (PW 2) has no where deposed that due to

permanent disability the claimant/appellant is not able to drive the motor vehicle. According to this witness, the claimant/appellant has certain difficulty in driving vehicle. Thus, considering the occupation of the claimant/appellant as driver and somewhat difficulty in driving motor vehicle, I hold that definitely at least the claimant has sustained 25% loss of income due to difficulty in driving vehicle. His earning capacity is not affected in to to, but certainly he has lost his earning capacity to the extent of 25%. Therefore, the notional monthly income of the claimant/appellant as driver can be considered at the rate of 6,000/- per month. No doubt, in "**National Insurance Company Ltd. vs Pranay Sethi and others" [2018 (3) Mh.L.J. 70]**, the claimant/appellant being employed person of the age below 40 years, 40% amount is to be added in the monthly income of the claimant. Thus, monthly income of the claimant has to be assessed as Rs. 6,000 + 2400 = Rs 8,400/-. As the claimant/appellant has sustained 25% loss of income, it can be assessed at Rs. 2100/-. Thus, annual loss sustained by the appellant/claimant is assessed as Rs. 2,100 x 12 = Rs. 25,200/-. As the claimant was 32 years old on the date of accident, the multiplier of "16" will be applicable in view of **"Smt. Sarla Varma and Ors Vs Delhi Transport Corporation and Anr" [AIR 2009 Supreme Court 3104]**. Thus, the loss of income of the claimant/appellant is assessed as Rs. 25,200 x 16 = Rs. 4,03,200/-.

15. In addition to this, as proved by Dr. Nehulkar (PW 2), the claimant/appellant is also entitled for the compensation of Rs. 17,900/-, rounded at Rs. 18,000/- under the head of medical expenses.

16. The claimant has not brought on record any evidence regarding the period of hospitalization. Therefore, no compensation can be awarded for the loss of actual earning during the period of treatment. Doctor Nehulkar (PW 2) has not deposed a word regarding future medical expenses of the claimant/appellant. Therefore, no compensation can be awarded under the head of future medical expenses. However, considering fracture injuries sustained by the claimant/appellant, compensation of Rs. 25,000/- has to be awarded under the head of damages for pains, sufferings and trauma. Considering the difficulty sustained by the claimant/appellant for driving motor vehicle, compensation of Rs. 20,000/- has to be awarded under the head of loss of amenities. Thus, claimant is entitled for following total compensation under the heads of :

1)	Loss of future earning on account permanent disability	Rs.	4,03.200/-
2)	Medical Expenses	Rs.	18,000/-
3)	Pains, sufferings and Trauma	Rs.	25,000/-
4)	Loss of amenities	Rs.	20,000/-
	Total =	Rs.	4,66,200/-

17. This compensation shall be inclusive of amount of no fault liability under Section 140 of the Motor Vehicles Act. The claimant/appellant is also entitled to interest on this compensation amount at the rate of 9% per annum from the date of filing of petition till its realization.

18. Accordingly, First Appeal No. 4669 of 2017 is allowed. The Judgment and award passed by Motor Accident Claims Tribunal, Sangamner in MACP No. 99 of 2007 is set aside. Award passed by the Tribunal is modified as follows :

> "i) Petition is allowed with proportionate costs.
>
> ii) Respondent nos. 1 and 2 do jointly and severally pay compensation of Rs. 4,66,200/- to the claimant/appellant inclusive of no fault liability with interest @ 9% per annum from the date of filing of petition till the full realization of aforesaid compensation amount.
>
> iii) Award be drawn up accordingly".

19. Parties shall bear their respective costs of the appeal. Appeal is disposed of in above said terms. Deficit court fees if any, be recovered from the claimant as per rules.

(SUNIL K. KOTWAL)
JUDGE

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