

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

FIRST APPEAL NO. 41 OF 2017

Sayyad Alisha Rajjak,	)	
Age: 8 years, Occu. Education,	)	
Under Guardian of Father	)	
Sayyad Rajjak Sayyad	)	
Mohammad, Age: 44 years,	)	
Occu: Medical Practitioner.	)	
R/O Dhanora, Tal. Ashti,	...	The Appellant /
Dist. Beed.		(Orig. Claimant)

Versus

1) Altaf Noormohamad Tamboli,	)	
Age: Major, Occup: Owner	)	
& Driver, R/o Kada, Tal. Ashti,	)	
Dist. Beed.	)	
2) The New India Assurance Co. Ltd.		
Through Its Branch Manager	)	
Branch Office at Jalna Road,	...	The Respondents
Beed, Dist : Beed.		(Orig. Respondents)

Shri. Sushant B. Choudhari, Advocate for Appellant
 Shri. G.R. Sayed, Advocate for Respondent No. 1
 Shri. S.G. Chapalgaonkar Advocate for Respondent No. 2

CORAM : A.M. DHAVAL, J.

RESERVED ON : 23rd JULY, 2018

PRONOUNCED ON : 16th AUGUST, 2018

JUDGMENT :

1. This is claimants appeal for enhancement of compensation awarded in the accident claim. In MACP No.273/13, the learned Member, Motor Accident Claims Tribunal, Beed by judgment dated 1st October, 2016 awarded compensation of Rs.6,00,000/- to the claimants. He has 7 year old girl and she suffered permanent disability shown as 35%. The claimant by the Appeal seeks enhancement to the tune of Rs.27,70,000/- restricted to Rs.10,00,000/- for the purpose of court-fee.

2. As per the claim petition on 12.02.2013 at 1.45 p.m. Sayyad Alisha aged 7 years was proceeding to a shop from her house at Ambhora. That time, tanker MH16 AE 7786 belonging to and driven by respondent No.1 and insured with respondent No.2 gave her forceful dash causing grievous injuries to her. The claimant was shifted to Pandit Hospital, Ahmednagar, where she underwent 3 operations. She was there for 4 days. Thereafter, she was shifted to Noble hospital. She was admitted from 15.02.2013 to 26.02.2013. She had suffered severe crush

injury to left thigh and was operated for debridement with skin grafting surgery. She claimed that she incurred medical expenses of Rs.4,00,000/- inclusive of travelling, diet and attendance.

3. The FIR came to be lodged after one month on 13.03.1013. The Claimant claimed that she had sustained 35% permanent disability and has to move in a wheel chair. Her marriage prospects are considerably reduced. She was a bright student and had high expectations in education and sports. She was doing household work and was also assisting her parents in the hospital and was earning Rs.5,000/- p.m. With these pleadings, she claimed compensation of Rs. 27,70,000/- including Rs.10,00,000/- for future economic loss, expenditure of Rs.5,00,000/- for future treatment and Rs.5,00,000/- for loss of amenities and loss of enjoyment of life.

4. Respondent No.1 driver has admitted the involvement of his vehicle, but denied any rashness and negligence on his part. He admitted that crime was registered against him. He was driving the tanker at the

relevant time and crime was registered against him. But the vehicle was duly insured at the relevant time. He was carefully driving the tanker, but the claimant all of a sudden, came in front of the tanker, still he applied brakes and tried to save her life. The claimant was too young to travel on a road. The spot panchnama is wrongly drawn and the spot was not on kaccha road.

5. Respondent No.2-insurance company filed written statement with Exh.16 and denied the various contentions made in the petition. The factum of involvement of the vehicle in the insured vehicle is denied. It is claimed that non-disclosure of the accident for a period of one month to the Police and to the Medical Officer is highly suspicious indicative of planting of the vehicle in collusion with respondent No. 1 and the Police. Respondent No.1 was not holding valid and effective driving license, fitness certificate and permit. There was a breach of policy. The claim is highly exaggerated. The claimant cannot be earning any income as claimed. The policy is subject to the confirmation. Hence, on the basis of this application, the issues were framed at Exhibit 22.

6. Initially, the claimant's claim came to be dismissed on 24.08.2015 for want of evidence showing involvement of the vehicle. Then, in the Appeal (First Appeal No.2552/2015), by judgment dated 07.04.2016, the matter was remitted to the Tribunal for fresh hearing. Again, the claimant examined additional witnesses and on the basis of evidence on record, the learned, Member, MACT accepted the case of involvement of the insured vehicle and causing of 35% permanent disability to the claimant. The breach of the terms and conditions of the policy was not proved. The claim was partly allowed to the tune of Rs.6,00,000/-. Hence this appeal.

7. Shri. Sushant Chaudhary, the learned advocate for the appellant argued that the learned trial Judge has shown conservative approach in awarding compensation. He has not considered the loss suffered by the claimant due to accident and future loss in the form of further medical expenses and loss of enjoyment of life and the loss of amenities and pains and suffering which was not actually compensated. He argued that the claimant was a brilliant

student and was also helping her parents and earning income. After considering all the facts, the appeal be allowed and the compensation amount be substantially enhanced.

8. Per contra, learned advocate Shri. Chapalgaonkar argued that involvement of vehicle itself was not proved. He submitted that the claimant has made very excessive and the exorbitant claim. There was no permanent disability and no huge losses as claimed. The girl was hardly aged 7 years and was studying in 1st Std. There could not have been any assessment of her future prospects on the basis of her performance in the 1st Std. The learned trial Judge has awarded more than adequate compensation and there is no case for enhancement of the same. Hence, the Appeal be dismissed.

9. Mr. G. R. Sayed learned advocate for the Respondent No.1 submitted that he had valid licence and therefore, respondent No.1 was noway concerned. The liability should be only on the insurance company.

10. The points for my consideration with my findings are as follows:

Points	Findings
(i) Whether it is open for the insurance company to challenge the involvement of the vehicle or the rashness and negligence thereof when the insurance company has not preferred any appeal ?	.. In the negative.
(ii) Whether the learned trial Judge has not granted just and reasonable compensation to the claimant ?	.. In the negative.
(iii) What order?	.. The appeal is dismissed

REASONS

11. Learned advocate Shri. Chapalgaonkar submitted that there was no involvement of the vehicle and there are circumstances indicating the said fact like delay of more than one month in lodging the FIR, non-disclosure of the accident even by eye witnesses to anybody, the non-arrest of the accused and detention of his vehicle on the spot. These facts are directly related to the decree awarded in favour of the claimant. If there was no involvement or there

was contributory negligence, the amount of compensation will have to be reduced/cancelled. In such case, the insurance company is bound to file Appeal or cross objection. It is well settled that in any Appeal by the claimant for enhancement, this court can either allow the Appeal or enhance the compensation or dismiss the Appeal, but cannot reduce the amount of compensation awarded on any ground. I therefore, hold that in absence of no cross-objection of the insurance company, it is not open for the insurance company to argue that the vehicle was not involved in the accident or that there was contributory negligence of the claimant.

12. Having said so, it must be also observed that mere delay in lodging the FIR cannot be a ground to discard the case of the claimant which is presented by examining the eye witnesses and Police Officer. When the insurance company claims that there was no involvement of the vehicle, it has to lead evidence of the truck driver. In the case of accident, the claimant has to prove her case by preponderance of probabilities. It is expected that court can consider the preponderance when both the parties have led

evidence. Then the court has to consider which case is more probable but when insurance company leads no evidence, the case of the claimant would go uncontroverted and unless it is inherently improbable, it will not be possible to discard it. The insurance company could have led evidence or could have secured admissions to make the case of the claimant inherently improbable in order to substantiate defence of plantation. It has not been done.

13. Now, only the question remains is about quantum. The evidence on record shows that claimant's father was BAMS. The claimant was born on 09.05.2006. She was aged about 7 years at the time of accident dated 12.02.2013. Nothing much can be read from the outstanding remarks given in the examination in 1st Std. Furthermore, the claimant has not sustained any injury to her head or to the brain. Her capacity to study further has not been affected.

14. On reading the papers, I find that the claimant's father has made the efforts to windfall and to encash the accident. He claimed exorbitant amount. The claim is full of

exorbitant claims. In ***National Insurance Company Vs. Pranay Sethi***¹, it is held as follows :-

“The Tribunal and the courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well-accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum.”

15. The claimant has not led any evidence to show that she was required to give up her further studies.

16. In the evidence it is shown that though she was aged 7 years, she was serving in the hospital after doing the household duties and was earning of Rs.5,000/- per month. No reasonable and prudent man can accept this pleading and evidence.

17. The belated FIR lodged after one month shows that when Alisha was dashed by the tanker, it came under driver side wheel and flesh from the calf came out and was

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partly clinging to the tyre. She was removed from the place under the tyre and thereafter, taken to the hospital and then she was operated. The spot panchanama drawn after one month is totally of no use.

18. The discharge card of Pandit Accident Hospital, Ahmednagar Exh.29 shows that the claimant was indoor patient from 12.02.2013 to 15.02.2013. She has crush injury to her left thigh in road traffic accident. She underwent debridement and dressing, then she was admitted in Noble Hospital, Ahmednagar from 15.02.2013 to 26.02.2013. Discharge certificate shows Polytrauma to left leg and the injury certificate issued by Pandit Hospital is at Exhibit 31 shows that crush injury to left thigh is grievous one, and certificate issued by Noble Hospital is at Exhibit 32. There are medical bills of Rs.2,20,000/- which are accepted by learned trial Judge, however, on careful perusal of these bills, it is evident that most of these bills are for the period of 12.02.2013 to 26.02.2013. The subsequent bills from 25.02.2013 to 02.05.2013 are for dressing only. The most material fact is that the bills dated 05.07.2013 and 25.11.2013 for 65 and 60 dressings Rs.350/- for each total

of Rs.43,750/- are issued by no one else than by father of the claimant. He himself is a Ayurvedic doctor and running Jeevan Hospital and these bills are issued by him. These bills are contrary to the bills of Sushrut Plastic Surgery Centre, Ahmednagar which shows that on 04.03.2013, 08.03.2013, 22.03.2013, 02.05.2013, the dressing was done in the said hospital. No father will charge dressing charges from his own daughter.

19. CW2, Dr. Rahul Pandit is a Orthopedics Surgeon. He has issued disability certificate at Exhibit 46. Initially, the patient was admitted to Dr. Pandit Hospital from 12.02.2013 to 13.02.2013. Again, he had examined her on 10.10.2013 and he found that thigh of the patient had become very slim. There was severe wasting of thigh muscle and complete stiffness of knee and ugly scar over her thigh and leg. Some photographs before skin grafting are filed, but subsequent photographs are not filed. He examined her and stated that patient was unable to sit, squat, run and climb stairs and she had 35 % permanent disability. The cross-examination of Dr. Pandit shows that there was no fracture of bone. There is no shortening of leg of the patient. There

was only muscle damage. Huge amount was spent for skin grafting and plastic surgery. When the evidence was led in the trial court, the claimant was not brought to the court. There is no medical bills of further treatment after the discharge of the patient. Not a single bill has been filed to show that the patient had purchased any equipments such as wheel chair, walker or support. If the claimant would not have been able to walk, she would have definitely purchased such equipments and bills would have been produced. Patient should have been produced to show her physical condition. There is no bone injury and when the discharge card does not disclose that the patient was not fully cured and when there are no further medical expenses except for the dressing, it is difficult to accept the evidence of 35 % permanent disability.

20. The claimant's father's evidence is not trustworthy and reliable as he is trying to make windfall out of the injury to his daughter and is making huge claims.

21. Even if it is accepted that there was 35 % physical disability, still it cannot be accepted that the

claimant is bed-ridden and is attached to the wheel chair and her future prospects are marred. There is no clear evidence about functional disability. In such case, her income could have been assumed at Rs. 15,000/- p.a. and multiplier would be 15%. If functional disability is accepted at 35% loss of income, which is $15000 \times 15 = 2,25,000 \times 35\% = 78,750$.

22. In the light of the facts above, the claimant was entitled for following amounts :-

1. Medical Expenses	Rs. 1,76,500/-
2. Loss of amenities & loss of enjoyment	Rs. 2,00,000/-
3. Pains and sufferings on account of serious injuries.	Rs. 1,00,000/-
4. Transport, attendance	Rs. 25,000/-
5. Loss of income	Rs. 78,750/-
Total	Rs. 5,80,250/-

23. The learned trial court has awarded compensation as follows :-

1. Medical Expenses	Rs. 2,20,000/-
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2. Permanent disability	Rs. 1,50,000/-
3. Transport, future treatment	Rs. 30,000/-
4. Pains and sufferings	Rs. 40,000/-
5. Loss of amenities & enjoyment of life	Rs. 2,00,000/-
Total	<u>Rs. 5,95,250/-</u>

24. I find that the compensation on the ground of medical expenses awarded is excessive by Rs. 43,750/- which are the bills issued by the claimant's father himself which could not have been granted. The income of the claimant aged 7 years was wrongly assumed at Rs.20,000/- per month which is on higher side. Considering all the facts, I find that the learned trial Judge was quite liberal in awarding the compensation of Rs. 6,00,000/- which is not at all inadequate or insufficient. The award of compensation cannot be windfall.

25. Considering the facts, the Appeal deserves to be dismissed and is accordingly dismissed.

Sd/-
[A. M. DHAVAL, J.]