

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

FIRST APPEAL NO.3155 OF 2016

Shaikh Jilani Shaikh Mithumiya,
Age 45 yrs., Occ. Nil,
R/o Maniyar Galli, Kandhar,
Tq. Kandhar, Dist. Nanded.

... **Appellant.**

... **Versus** ...

Maharashtra State Road Transport Corporation,
Through its Divisional Controller,
Nanded.

... **Respondent.**

...

Mr. Zia Ul Mustafa, Advocate for the appellant
Mrs. R.D. Reddy, Advocate for the sole respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 24th JULY, 2019

PRONOUNCED ON : 20th AUGUST, 2019

JUDGMENT :

1 Present appeal has been filed by the original claimant for enhancement in the compensation granted by Ex-Officio Member, Motor Accident Claims Tribunal and District Judge-1, Kandhar, Dist. Nanded in M.A.C.P No.11/2010 dated 08.01.2015, whereby the petition under Section

166 of the Motor Vehicles Act came to be partly allowed.

2 The factual matrix leading to present appeal are, that the claimant aged 40, who was doing private service as Munim with Modern Cloth Stores, Kandhar and was getting Rs.4,500/- per month, met with accident on 14.01.2010 at about 12.00 p.m. on Kandhar-Kurula road. He was travelling in auto rickshaw bearing No.MH 26/G-0366. When they were near the school in village Ghodaj, at that time S.T. Bus bearing No.MH 20/D-4776 came from opposite direction in high speed. Due to rashness and negligence on the part of the S.T. Driver the bus dashed auto rickshaw, as a result of which claimant got severe injuries. He was then shifted to Rural Hospital, Kandhar. Bus driver has been prosecuted. Claimant had sustained crush injury to his right leg, polytrauma with amputation of right lower limb above knee and injury to his left ankle joint. He has taken treatment in various hospitals and incurred huge amount, however, his injury has turned into permanent physical disablement. The said S.T. Driver was under the employment and the offending bus was belonging to respondent. Initially amount of Rs.5,00,000/- was claimed as compensation and later on it has been enhanced to Rs.8,00,000/-.

3 The respondent filed written statement and denied all the

averments in the petition. Age, income and occupation of the claimant is denied. It is also denied that the accident had taken place due to the negligence on the part of the S.T. Driver.

4 After framing of issues claimant as well as respondent led evidence. Taking into consideration the evidence on record the learned Tribunal has held that the accident has taken place due to the negligence on the part of the S.T. Driver. Claimant sustained permanent physical disability to the extent of 70%, taking into consideration the disability certificate, which has been produced on record. There is no contributory or composite negligence on the part of rickshaw driver and therefore, the respondent is liable to pay compensation to the claimant. Compensation of Rs.5,67,500/- has been granted together with interest @ 6% per annum. Hence, the claimant has filed present appeal for its enhancement.

5 Heard, learned Advocate Mr. Zia Ul Mustafa for appellant-claimant and learned Advocate Mrs. Ranjana D. Reddy for respondent.

6 It has been vehemently submitted on behalf of the learned Advocate appearing for the appellant that the learned Tribunal failed to consider that right leg above knee of the claimant has been amputated. He was serving as Munim and nature of his job was to collect outstanding amounts

by paying visits to various customers of the shop belonging to his employer. Therefore, the learned Tribunal ought to have held that there is 100% loss of income to the claimant. Claimant had examined CW 3 Dr. Manish, who had treated the claimant, who has stated that there is 100% disability to the right leg of the claimant. He has also stated that when he had examined the claimant on 14.01.2010, at that time, it was noticed by him that claimant had crush injury to right lower limb and the second was urethral rupture. Therefore, the calculation of compensation ought to have been done on the basis of 100% loss of income. He also relied on the decision in **Mohan Soni vs. Ram Avtar Tomar and others, (2012) 2 Supreme Court Cases 267,** wherein it has been observed -

“When consideration of hypothetical factors like possibility of change of vocation/adopting another means of livelihood are raised then such indeterminate factors should not be taken into account. Scaling down of compensation requires something more tangible. A party advocating for lower amount of compensation must plead and show victim enjoyed some legal protection which compensated victim in some other manner or had in fact changed his vocation or means of livelihood from which he was deriving certain amount.”

This was on the basis of the observation by learned Tribunal that though there is imputation of right leg of the claimant above knee, he can still do the job of Munim which is mainly of sitting nature. The learned

Advocate for the appellant further submitted that the Tribunal did not consider any amount towards future prospect, pain and sufferings and loss of amenities.

7 Reliance has been placed on the decision in **Sanjay Kumar vs. Ashok Kumar and other, 2014 ACJ 653**, wherein 50% of the income was given in addition to the income towards loss of future income, Rs.1,50,000/- towards pain and sufferings and the interest was awarded @ 9% per annum. The medical reimbursement has also not been granted and therefore, the compensation, that has been awarded by the Tribunal, needs enhancement.

8 Per contra, the learned Advocate appearing for the respondent submitted that as per the disability certificate Exh.49 itself, it has been held that there would be 70% of the loss of income i.e. equivalent to the physical disability. No error can be said to have been made by the learned Tribunal in granting 70% towards loss of income. As regards hospital bills, the claimant has not examined another author to the document. So also, a statement was made that he has received certain amount from the insurance company. He cannot get the reimbursement of that amount, which he has already taken from the insurance company. Learned Advocate for the respondent supported the reasons given by the learned Tribunal.

9 Taking into consideration the submissions above, following points arise for determination. Findings and reasons for the same are as follows.

- 1 Whether there is necessity to enhance the compensation amount than awarded by Tribunal ?
 If yes, what could be the enhancement ?
- 2 Whether matter deserves remand ?

REASONS

10 Taking into consideration the record and proceedings and the submissions, those have been made, it would be appropriate to take the second point first for consideration. It is to be noted that the claimant has examined himself and in order to prove the injuries, he has also examined the treating Doctor i.e. CW 3 Dr. Manish. It is not in dispute that the right leg above knee of the claimant has been amputated. However, it is to be noted that CW 3 Dr. Manish has only stated that claimant has sustained 100% disability to his right leg, that means, the percentage of disability given by him was restricted to particular limb and it was not in respect of whole body. He is not the author of disability certificate which is filed in the form of Comp-B. The Medical Officer, S.G.G.S. Memorial Hospital, Nanded was not

examined to prove the disability, however, the exhibit is given. The Judgment of the Tribunal as well as Exh.49 itself is very much silent on the point, as to how the said document came to be exhibited. Though in any proceedings before Motor Accident Claims Tribunal strict proof of evidence is not necessary and the nature of those proceedings is summary, yet, a note of the decision of this Court in **Rekha wd/o Ramrao Bhujang vs. Sundarabai wd/o Keshavrao Gunage, 2012 (3) Mh.L.J. 249** is required to be taken, which was under Order 13 Rule 4 of the Code of Civil Procedure. This Court has observed,

“When document contents and endorsement show that it is proved by DW 6, said endorsement for “Exhibit” has to be signed or initial by the Judge. No signature or initial of the Judge appears on the said endorsement of “Exhibit” nor there is a statement on the document having been admitted in evidence nor it contains the name of person producing the document. All these anomalies would make it abundantly clear that the document is not exhibited in accordance with the Rule 4 of Order 13 of CPC. It is trite that when law requires a particular thing to be done in a particular manner, it has to be done in that manner. In view of that it will have to be held that the said document is not exhibited according to Rule 4 of Order 13 of CPC and the same is not exhibited in the eye of law”.

11 Here, in this case, there is absolutely no mention, as to how this document came to be exhibited. The said document, even if taken as it is,

shows that it was issued by a Medical Officer from Government Hospital, yet, it cannot be considered as a public document as contemplated under Section 74 of the Indian Evidence Act. Further, in view of the decision in **Rajesh Kumar @ Raju vs. Yudhvir Singh and another, 2008 ACJ 2131 (SC)**, “Tribunal cannot accept a disability certificate without examining the Doctor concerned”; the learned Tribunal ought not to have exhibited that document and it could not have been read in evidence. Further, this Court (Nagpur Bench) in the **United India Insurance Company Ltd. vs. Alpesh Harshadlal Mashruwal and others, First Appeal No.197 of 2006** decided on 09.08.2017 after noting that admittedly author of the certificate is not examined and decision in **Rajeshkumar** (supra) observed that “in view of the above legal position, disability certificate Exh.39 should have been proved by the Medical Officer of Nair Hospital, who issued the same. In the absence of evidence of author of permanent disability certificate, it cannot be said that permanent disability certificate has been duly proved”.

12 The above said pronouncement by Hon'ble Supreme Court has been relied by various High Courts and it has been held that in absence of examining the medical officer, who has issued the disability certificate, the disability certificate cannot be said to have been proved and therefore, it cannot be relied. Under such circumstance, in fact, in this case the claimant

ought to have examined the author of the disability certificate. Since he has not been examined, in the interest of justice, the matter deserves remand. Admittedly, there is imputation of the right leg, but when one Doctor restricting the percentage of disability to a particular limb has been examined and the person who had assessed the disability as a whole appears to have not been examined, it would be in the interest of justice, especially with the background that when claimant was able to prove that the accident had taken place due to the negligence on the part of the driver of respondent, the matter deserves remand. It is, further, also required to be considered that whether the said imputation of one leg had affected the entire earnings of the claimant or not, taking into consideration the job claimant was doing prior to the accident. Under such circumstance, this Court refrains itself from dealing with other points raised by the learned Advocate for the appellant. Point, therefore, deserves to be kept open for the decision by the Tribunal. With these observations, following order is passed.

ORDER

1 The appeal is hereby partly allowed.

2 The Judgment and Award passed in M.A.C.P No.11/2010 by learned Ex-Officio Member, Motor Accident Claims Tribunal and District

Judge-1, Kandhar, Dist. Nanded dated 08.01.2015 is hereby set aside.

3 The said petition is restored on the File of the learned Member, Motor Accident Claims Tribunal, Kandhar, for deciding it according to the provisions of law.

4 Both parties to appear before the Tribunal on 26.08.2019.

5 Needless to say that since the petition of 2010 is remanded, the learned Tribunal would decide it as expeditiously as possible, within a period of six months from the date of appearance of both the parties.

6 The learned Tribunal should give an opportunity to the claimant to examine the author of disability certificate or in addition the claimant may get his disability assessed by the committee established in Government Hospital, Nanded and then examine any one of the member of the committee.

7 Tribunal to given opportunity to both the parties to lead appropriate evidence.

8 Record and Proceedings be sent back.

(Smt. Vibha Kankanwadi, J.)

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