

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

First Appeal No. 01941 of 2016

District : Osmanabad

Nitin s/o. Narayanrao Magar,
Age : 22 years,
Occupation : Education,
R/o. Sant Goroba Kaka Nagar,
Sanja Road, Osmanabad,
Taluka & Dist. Osmanabad.

.. Appellant
(Original
claimant)

versus

1. Umesh Dattoba Gund
(Died) through L.Rs.,

1A. Smt. Anita Umesh Gund,
Age : 30 years,
Occupation : Household,
R/o. Padali (Akkubai),
Taluka & Dist. Osmanabad.

1B. Rushikesh s/o. Umesh Gund,
Age : Minor.

1C. Vrashali D/o. Umesh Gund,
Age : Minor.

1D. Prathmesh s/o. Umesh Gund,
U/g. of respondent No.1A
i.e. real mother.

.. Respondents
(Original
respondents)

2. The Branch Manager,
The New India Assurance
Company Ltd.,
Shivaji Chowk,
Taluka & Dist. Osmanabad.

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Mr. R.K. Ashtekar, Advocate, for the appellant.

Respondents no.1A to 1D served (Absent).

Mr. M.M. Ambhore, Advocate, for respondent no.02.

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 26th August 2019**

**Date of pronouncing
the judgment : 15th October 2019**

JUDGMENT :

01. Present appeal has been filed by the original claimant for enhancement in the compensation granted by Ex officio Member of the Motor Accident Claims Tribunal, Osmanabad, in M.A.C.P. No.85 of 2003, dated 13-08-2007.

02. The present appellant - claimant had filed the said petition for compensation on account of injuries suffered by him in motor vehicular accident, under Section 166 of the Motor Vehicles Act, 1988. The claimant contended that he along with his friend were proceeding towards their house situated at Sant Goroba Kaka Nagar, Sanja Road, Osmanabad, at about 06.00 p.m. to 06.30 p.m. on 24-01-2003 on motorcycle bearing no. MH-25/1628. The claimant himself was driving the said motorcycle

and his friend was pillion rider. According to the claimant, he was in slow speed and on his correct side of the road. He was dashed by auto-rickshaw bearing no. MH-25/B-60 which had come from opposite direction. The said dash was received when the auto-rickshaw was overtaking another auto-rickshaw ahead of it. As a result of the dash, the claimant as well as his friend fell down and sustained grievous injuries. Claimant has received grievous injuries to his right leg, right foot and right hip. The claimant contends that the accident took place due to the sole negligence on the part of rickshaw driver. The said rickshaw was owned by respondent no.01 and it was insured on the date of the accident with respondent no.02. After the claimant had received injuries, he was admitted in Civil Hospital at Osmanabad and for better treatment, he was shifted to Khairnar Hospital at Solapur. It is stated that his right leg was fractured at three places and therefore, implant has been inserted. He has incurred huge expenditure. However, the said injury has turned into permanent disability for him. He is unable to walk as before. At the relevant time, he was studying in 10th standard and he was aged 19 years. He claimed compensation of Rs. 5,00,000/- but restricted it to Rs. 2,00,000/-.

03. The matter proceeded without written statement against respondent no.01. Respondent no.02 filed written statement and denied all the averments in the petition. Age, education, treatment expenditure, injuries sustained by claimant, as contended in the petition, have been denied specifically. It has been denied that the said accident took place due to the rickshaw driver. Statutory defence has been taken. so also, it is stated that the claimant was not holding valid and effective driving license to drive the motorcycle on the date of the accident and because of his own negligence, the accident had taken place.

04. Taking into consideration rival contentions, issues were framed. Only claimant led oral as well as documentary evidence. Taking into consideration the evidence on record, the learned Tribunal has come to the conclusion that the applicant has suffered permanent physical disability in the said accident and the said accident was caused due to the sold negligence on the part of rickshaw driver. The Insurance Company failed to prove breach of terms of policy and therefore, respondents no.01 and 02 both are liable to pay compensation jointly and severally to the claimant. Amount of Rs. 86,000/- has been awarded

as compensation together with interest. Hence, the present appeal for enhancement.

05. Heard learned Advocate Mr. R.K. Ashtekar for the appellant. Heard learned Advocate Mr. M.M. Ambhore for respondent no.02 - Insurance Company. Respondents no.1A to 1D, though served, failed to appear.

06. It has been vehemently submitted on behalf of the appellant, that the learned Tribunal did not consider the disability sustained by the appellant properly. The assessment of compensation is not proper. Though the claimant was not earning, yet a hypothetical figure ought to have been taken so as to assess the future loss taking into consideration present physical disability. Reliance has been placed on the decision in *Ramandeep Singh Vs. Sucha Singh and others* [2016 0 Supreme (P&H) 299], wherein the Punjab and Haryana High Court considered the income of the claimant who was doing Diploma in Engineering, at the rate of Rs. 3,000/- and then assessed the compensation. Further reliance has been placed on the decision in *Raj Kumar Vs. Ajay Kumar & another* [2011 0 ACJ 1], wherein it has been held that "Award to be passed by the Motor Accident Claims Tribunal must be just compensation and should fully and adequately restore the claimant to the position prior to the accident. The object of

awarding the compensation is to make good the loss suffered as a result of wrong done. Therefore, the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation." It is further observed that *"In case of an injured claimant with a disability, what is calculated is future loss of earning of claimant, payable to claimant. There is no need to deduct one-third or any other percentage from out of income, towards personal and living expenses."* He therefore, prayed for awarding just compensation.

07. Learned Advocate appearing for the Insurance Company submitted that the learned Tribunal has assessed the evidence properly and had come to the right conclusion. No proper evidence has been adduced by the claimant to support his claim to the tune of Rs. 5,00,000/-. Though the Doctor who certified the disability certificate was examined, yet, it can be seen that the said percentage of disability was restricted to a particular limb and no evidence has been adduced by the claimant to prove that the said disability has affected his earning capacity.

08. Taking into consideration the above said submissions, following points arise for determination:-

(I) Whether the learned Tribunal was

justified in awarding Rs. 86,000/- as compensation to the claimant for 25 % permanent physical disability suffered by him in the vehicular accident ?

(II) What would be the just compensation ?

09. Before the discussion proceeds, it can be noted that the respondents have not filed any cross appeal or cross objection challenging the other findings given by the learned Tribunal and therefore, the scope of the present appeal is restricted to the enhancement in compensation.

10. The claimant has examined himself to support his claim. So also, he has examined CW 03 Dr. Subhash Mortale who issued certificate Exhibit 65. As per certificate Exhibit 65, permanent physical disability sustained by the claimant is 25 %. However, testimony of the said Doctor would make it clear that the said percentage is restricted to particular limb. The concerned Doctor had found that the claimant had suffered fracture tibia fibula and dislocation of right hip with knee stiffness with limb disparity and therefore, he assessed the disability to 25 %. Important point to be noted is that in his examination in chief, he has only stated that due

to the disability, the claimant would be unable to do strenuous work. He has not explained that the said 25 % permanent physical disability has resulted into 100 % financial loss to the claimant as he would be unable to do any kind of work. In his cross examination, the concerned Doctor has stated that he is unable to tell that there was any dislocation of hip. According to him, for isolated part of that limb, there is 100 % disability from right hip to toe; but then he says that he has assessed it to 25 % only. He does not say that the claimant will not be squat sit down, walk properly, etc. The words '*strenuous work*' used by him in his examination in chief have not been explained by him. Taking into consideration the injuries suffered, it can be stated that with the said disability, claimant would be receiving at least 10 % wages less than he could have earned, had there been not disability within him. Therefore, the calculation would be based on 10 % financial loss. The claimant was taking education when the accident took place. He says that he could not prepare for his 10th standard examination and then in his cross examination he says that he has left the education. It has not been brought on record by the claimant that due to the injuries, he has been advised not to appear for any examination and not to take further education. But it appears that he has

never taken or attempted to take further education. Therefore, at the most, his position would be equivalent to that of a labour.

11. The accident had taken place in the year 2003 and therefore, at that time, he would have fetched at least Rs. 3,000/- per month. Therefore, that is taken as his income. The ratio laid down in both the authorities relied by the learned Advocate for the appellant is being considered for calculating the compensation. In view of the decision by Constitution Bench of the Hon'ble Supreme Court in *National Insurance Company Limited Vs. Pranay Sethi & others* [AIR 2017 SC 5157] and taking into consideration the age of the claimant, 40 % of the income is required to be added towards future prospects. His income then would be Rs. 4,200/- per month. Yearly it would be Rs. 50,400/-. That means, per year, the claimant would have at least earned that much amount. However, as aforesaid, there is only 10 % financial loss which comes to Rs. 5,040/- per month. The just multiplier in this case would be '18' in view of the decision in *Sarla Verma & others Vs. Delhi Transport Corporation & another* [(2009) 6 SCC 121]. Therefore, future loss of income for the claimant would be Rs. 90,720/-.

12. Taking into consideration certain receipts

and medical expenditure incurred with transport and attendance, it would be appropriate to award amount of Rs. 40,000/- under the said head. Further amount of Rs. 25,000/- is granted towards disability sustained by the claimant. So also, amount of Rs. 25,000/- is awarded towards pain and suffering. Further amount of Rs. 5,000/- is awarded towards special diet. Thus, the claimant would be entitled to get total compensation of Rs. 1,85,720/- (including amount under '*no fault liability*'). The amount of Rs. 86,000/- granted by the Tribunal is very much meager, taking into consideration the evidence adduced by the claimant. It ought to have been endeavour of the Tribunal to grant just compensation to the claimant. Therefore, the appeal deserves to be partly allowed.

13. Hence, the following order :-

(a) The appeal is hereby partly allowed.

(b) The judgment and award passed by the Ex officio Member of the Motor Accident Claims Tribunal, Osmanabad, in M.A.C.P. No.85 of 2003, dated 13-08-2007, is hereby set aside and modified to the extent of quantum only, as follows :-

"(ii) The respondents no.01 and 02 are directed to pay jointly and severally, amount of Rs. 1,85,720/- [Rupees one lac, eighty five thousand, seven hundred twenty only] towards compensation (inclusive of amount under '*no fault liability*') to the claimant, along with interest at the rate of 7.5 per cent per annum, from the date of institution of petition till actual realization of the entire amount."

(c) It is clarified that the amount already deposited towards the impugned award be adjusted towards modified award.

(d) It is further clarified that rest of the award is kept as it is.

(e) There shall be no order as to costs.

(Smt. Vibha Kankanwadi)
JUDGE

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