

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

FIRST APPEAL NO.542 OF 2011

Ganesh s/o Dhanraj Tapkir,
Age : 32 years, Occ. Driver,
R/o Khandwi, Taluka Karjat,
District Ahmednagar.

... Appellant
(Original Claimant)

VERSUS

1. Santosh s/o Bhausaheb Shinde,
Age : Major, Occ. Agriculture &
Transport, R/o Hanga,
Taluka Parner, District Ahmednagar
2. The Manager,
The Oriental Insurance Company Ltd.,
Ambar Plaza Building, Station Road,
Ahmednagar.

... RESPONDENTS
(Orig. Opponents)

...

Advocate for Applicant : Mr. Prabhakar B. Vihe Patil

Advocate for respondent no.2 : Mr. Jain h/f. Mr. P.P. Bafna

...

CORAM : MANGESH S. PATIL, J.

Reserved on : 14.11.2019

Pronounced on : 20.11.2019

JUDGMENT :

This is an appeal under Section 173 of the Motor Vehicles Act 1988 by the original claimant not being satisfied with the judgment and award passed by the Motor Accident Claims Tribunal in his petition under Section 166 of that Act, preferred by him claiming compensation for the injuries sustained in an accident involving a motor vehicle owned by the respondent no.1 and insured with the respondent no.2 insurance company at the material time.

2. Shortly stated the appellant's case is to the effect that he was 28 years of age and was serving as a driver of a road roller with one Gulab Karale and was earning a salary of Rs.3000/- per month and Rs.100/- per day as Bhatta. On 13.05.2007 at about 8.00 p.m, while he was returning home after the day's work, a Jeep bearing No. MH.16-B.6945 came from behind him and knocked him down near his residence in Nagari colony of Khandwi, Taluka Karjat. As a result he sustained a fracture to the left leg. He was shifted to Bhagirathi Hospital and was operated upon. A steel rod was implanted. He was treated there as an indoor patient between 13.05.2007 and 30.05.2007. In spite of such treatment he suffered permanent disability. He had to spend around Rs.50,000/- for medical treatment. The accident had occurred due to rash and negligent driving of the driver of the Jeep against whom the offence was registered. The Jeep was owned by respondent no.1 and was ensured with respondent no.2 Company at the material time and thus he claimed compensation of Rs.2,00,000/-

3. The respondent no.1 did not contested the matter which proceeded in his absence.

4. The respondent no.2 company contested the matter by its written statement (Exh.12). It denied that the accident had occurred

due to rash and negligent driving of the Jeep driver. It denied that the appellant was walking along the road and was dashed by the Jeep from behind. It further denied about he having sustained any fracture and to have been treated in Bhagirathi hospital or any implant having been fixed. It also denied about he having sustained any permanent disablement. It then denied his occupation and income. It did not dispute that the Jeep was insured with it at the material time by the respondent no.1. However, it contended that the driver of the Jeep was not holding effective and valid driving licence and therefore there was breach of the terms and conditions of the policy by the respondent no.1 and it stood exonerated of the liability to indemnify him.

5. After hearing, by the impugned judgment and award the Tribunal held that the appellant had proved that he had sustained permanent disability on account of the use of the motor vehicle which was owned by the respondent no.1 and insured with the respondent no.2 Company at the material time but awarded him Rs.86,570/- together with interest @ 6% per annum from the date of the petition, which amount was inclusive of the amount of Rs.25,000/- received by him under Section 140 of the Motor Vehicles Act. Hence this appeal.

6. The learned advocate for the appellant submitted that the Tribunal has grossly erred in assessment of the compensation. In spite

of having correctly held that he had suffered permanent disablement, it erred in discarding his version of being a driver of road roller having requisite licence. It wrongly proceeded to assess the compensation by taking notional income as the base. It also failed to take into account future prospects. The observations and the conclusions of the Tribunal while assessing the compensation are quite perverse and arbitrary and not legally sustainable. It failed to arrive at the figure of just compensation. The impugned judgment and award, therefore, to the extent of quantum of the compensation fixed may be quashed and set aside and he may be awarded a just compensation.

7. The respondent no.1 failed to appear in spite of service of notice.

8. The learned advocate for the respondent no.2 supported the impugned judgment and award. He submitted that there is no error committed by the Tribunal in determining the compensation. It had correctly appreciated the fact of absence of sufficient evidence regarding occupation and income of the appellant and was left with no other alternative but to assess the compensation by taking into account a notional figure. Though he had averred that he was holding a driving licence to drive a road roller, none was produced on record to substantiate his version. He specifically denied during his cross

examination a suggestion that he did not possess any such licence but still he failed to produce it. Therefore, the Tribunal was left with no alternative but to take his notional income as the base and has assessed the compensation.

9. The learned advocate would further pointed out that though the appellant stated to be in the employment of one Gulab Karale, neither this employer was examined nor was any certificate issued by him was produced on the record. Thus he submitted that there is no illegality in the quantum of compensation assessed by the Tribunal.

10. At the out set, it is necessary to note that the version of the appellant as to the manner of occurrence of the accident remains uncontroverted in as much as the respondent no.1 who is the owner of the offending jeep could have but failed to contest the petition and though the respondent no.2 Company has been contesting it, no attempt was made by it to examine the driver of the Jeep who was an employee of the respondent no.1. It has merely been suggested to the appellant during his cross examination on behalf of the respondent no.2 that the road at the spot was 24 feet wide, besides it was having 10 feet kachaa road on either side and that the collision had taken place in the middle of the road and he was walking along the middle

of the road. Obviously he has denied all these suggestions. There being no other evidence and when the driver of the Jeep has been prosecuted for causing the accident and in the absence of any other version coming from the respondents as to the manner of occurrence of the accident, no fault can be found with the judgment and award to the extent holding the driver of the Jeep to be rash and negligent and responsible for causing the accident. In fact, the respondents themselves having not preferred any appeal, even this aspect now stands concluded.

11. Now the more crucial dispute is as to the quantum of the compensation assessed by the Tribunal.

12. As far as age of the appellant is concerned, no dispute has been raised that he was aged 28 years on the date of the accident. So far as his version about his occupation and income is concerned, except his highly interested words there is absolutely no evidence to prove these facts. Though he has stated that he was serving as a road roller driver and was holding the licence to that effect, none has been produced. He has also not examined his employer. Therefore, the observation and the conclusion of the Tribunal about he having failed to prove these facts is clearly unassailable.

13. Apart from this state of affairs, during his testimony the

appellant specifically stated his occupation at the beginning itself to be agriculturist. In the absence of any concrete evidence about his occupation and income, the Tribunal has rightly assessed the compensation by assuming his notional income to the Rs.100/- per day i.e. Rs.3000/- per month.

14. The appellant has examined one Dr. Muley who is an Orthopedic surgeon, running hospital in name and style Bhagirathi hospital. He specifically stated about having treated the appellant for a fracture of tibia. He operated him and implanted a rod and treated him as an indoor patient initially between 13.05.2007 and 30.05.2007. He then stated to have performed bone grafting and nailing in the second phase between 14.01.2008 and 29.01.2008. He has then stated that in between these two periods the appellant had consulted him as an outdoor patient at 10 to 15 occasions. He had suffered 20% disability and accordingly he issued the disability certificate (Exh.28). He further stated that because of the injury the appellant is unable to do heavy work and cannot drive. He then stated that for the first phase of treatment a bill (Exh.29) was issued for an amount of Rs.34,035/- and for the second phase of the treatment the bill (Exh.30) was issued by his cashier and that this bill is of Rs.36,830/-. He further stated that the implant was still inside and the appellant would require another Rs.15,000/- to Rs.20,000/- for removing it in

future and accordingly he issued a certificate to that effect (Exh.31).

15. During his cross examination Dr. Muley has stated that the fracture has reunited. He had not brought the O.P.D. register to substantiate his version about appellant having consulted him as an outdoor patient for 10 to 15 times. He further stated that he had only brought record in respect of the first phase of the treatment. When it was suggested to him that since the appellant had not been to him and he having never treated the appellant as averred in the second phase he had not brought any record in respect of the second phase of the treatment. He denied the suggestion. He further stated not to have himself tested if the appellant was unable to driver and was unable to perform heavy work. He then denied to have issued a false certificate regarding permanent disablement to be 20% and also denied suggestion that he was deposing falsely that appellant was required to spend Rs.36,830/- for the second treatment and would require Rs.15,000/- to Rs.20,000/-for further treatment for removal of the implant.

16. The argument of the learned advocate for the respondent no. 2 that as far as the second phase of medical treatment is concerned version of the Dr. Muley was an improvised version and therefore was not believable in as much as the appellant himself has not stated

anything about, it has been accepted by the Tribunal. It is true that in the petition as well as in his testimony the appellant has not at all whispered about second phase of the treatment. It is pertinent to note that accordingly the cash memo (Exh.30) of such second phase of the treatment, it was issued on 29.01.2008. It is therefore apparent that such second phase of the treatment has taken place after filing of the petition before the Tribunal. It was filed on 03.07.2007. But then conspicuously the testimony of the appellant was recorded on 06.04.2010. It is quite clear that this bill (Exh.30) was produced along with list (Exh.17) on 06.04.2010 i.e. on the date of his deposition and in the examination in chief itself he specifically recorded such second phase of the treatment which had taken place after filing of the petition. Technically he could have first sought amendment of his petition and add this version regarding second phase of the treatment taken by him during pendency of the petition.

17. It is to be borne in mind that this is a petition under Section 166 of the Motor Vehicles Act and strict rules of pleadings as are applicable to civil proceeding, laid down under the Code of Civil Procedure are not applicable. The petition under this provision cannot be equated with a plaint. Besides, apparently no objection was raised on behalf of the respondent when these documents particularly this cash memo (Exh.30) was produced along with the list of documents

(Exh.17) on the date of deposition of the appellant. If such is the state of affairs, in my considered view, the tribunal had clearly erred in straight way discarding this piece of evidence on unsustainable grounds of absence of any foundation in the pleadings. Merely because Dr. Muley has stated to have treated the appellant one cannot jump to the conclusion attributing bias on his part. At least there is no material and nothing could be elicited during his cross examination to attribute some motive to him when he stated to have treated the appellant for the second phase of the treatment between 14.01.2008 and 29.01.2008. The observations and the conclusions of the tribunal discarding the actual medical expenses incurred by the appellant for this period, therefore, is not sustainable and is clearly perverse.

18. Obviously there being no other evidence to show that the permanent disability of 20% assessed by Dr. Muley has in fact resulted in causing any lose of earning capacity, the tribunal has been right in assessing the compensation notionally under the head of permanent disablement at Rs.20,000/-. Similarly no fault can be found with the assessment of the compensation on account of special diet, attendance and conveyance at Rs.5000/-.

19. Taking into account the entire evidence on the record and the discussion herein above, the appellant deserves to be compensated

for actual medical expenses by taking into consideration the bills at serial No.1 to 15 which have been collectively Exhibited as Exh.34 which in aggregate comes to Rs.52,570/- and also deserves to be compensated for the second phase of the treatment as per the cash memo (Exh.30) which is for an amount of Rs.36,830/-. Obviously, even for the second phase of the treatment he must have spent for special diet, attendance and conveyance and an additional amount of Rs.5000/- collectively towards these expenses can be awarded to him. It is also important to note that inspite of having sustained a fracture of the Tibia in a road accident and having under gone a prolonged medical treatment including a surgery on two occasions, nothing has been awarded by the Tribunal under the conventional head of pains and sufferings. In my considered view the appellant deserves to be compensated under that head by paying Rs.10,000/-.

20. Thus the amount of just compensation in my considered view which is borne out from the evidence is as under :

1. Actual Medical Expenses and Medicines	52,570 + 36,830=Rs.89,400/-
2. Permanent disability of 20%	Rs.20,000/-
3. Pains and sufferings	Rs.10,000/-
4. Special diet, attendance and conveyance	Rs.10,000/-
Total Rs.1,29,400/-	

21. Obviously, since there is no evidence about the disability having any adverse effect on the earning capacity of the appellant, he cannot be awarded any compensation under the head of lose of future prospects. In view of the above, the impugned judgment and award passed by the Tribunal as far as quantum is concerned needs to be modified to the extent as discussed herein above.

22. The First Appeal is allowed partly. The impugned award is modified as under :

The respondent nos. 1 and 2, jointly and severally, shall pay to the appellant Rs.1,29,400/- inclusive of the amount of compensation received by him under Section 140 of the Motor Vehicles Act, together with interest @ 6% per annum from the date of the petition i.e. 03.07.2007 till realization of the entire amount.

(MANGESH S. PATIL, J.)

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