

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

First Appeal No. 0299 of 2019

District : Ahmednagar

The New India Assurance Company Ltd.,
Through : Its Branch Manager,
Near Abbott Building,
Zendi Gate, Ahmednagar.

Through its Divisional Manager/
Authorized Signatory,
Mahesh Auto Compound,
Adalat Road, Aurangabad.

.. Appellant
(Original
respondent
no.02)

versus

1. Shrikant Rohidas Ghodke,
Age : 31 years,
Occupation : Service,
R/o. Nagapur, MIDC,
Ahmednagar,
Dist. Ahmednagar.
2. Balasaheb Babasaheb Misal,
Age : Major,
Occupation : Business,
R/o. Kadamwak Vasti,
Taluka Haveli,
Dist. Pune.

.. Respondents
(No.01 -
Original
Claimant
&
No.02 -
Original
respondent
no.01)

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Mr. S.G. Chapalgaonkar, Advocate, for the appellant.

Mr. N.C. Garud, Advocate, for respondent no.01.

Mr. M.R. Khutwad, Advocate, for respondent no.02.

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 04th July 2019**

**Date of pronouncing
the judgment : 29th August 2019**

JUDGMENT :

01. Present appeal has been filed by the original respondent No. 2 – insurance company challenging the judgment and award passed by Learned Motor Accident Claims Tribunal, Ahmednagar, in Motor Accident Claims Petition No. 121 of 2013 dt. 30-11-2017; whereby said petition filed under Section 166 of Motor Vehicles Act, 1988 by present respondent No. 1 came to be partly allowed against it.

02. Original claimant had come with a case that he was 26 year old person, serving in a private company and earning Rs.10,000/- p. m. He was proceeding with his friend on motorcycle bearing No. MH-16-AU-8091 from Nagapur MIDC to Pathardi to attend Higher Secondary examination on 19-03-2012. His friend was driving the motorcycle and he was pillion rider. When they reached Karanji Ghat around 9.00 a. m., one Tanker bearing No. MH-12-CH-2435 came from opposite direction in negligent manner. The Tanker came to its wrong side and gave dash to the motorcycle. As a result of which,

claimant sustained serious injuries to his leg and other parts of the body. He was admitted to Patil Hospital from 19-03-2012 to 07-04-2012. His right leg was required to be amputated below knee. He has thus, suffered permanent disability. The said accident had taken place due to the sole negligence of Tanker driver, who has then been prosecuted by police. The said Tanker was owned by respondent No. 1 and it was insured with respondent No. 2 on the date of the accident. Claimant has therefore, claimed compensation from the respondents jointly and severally with interest.

03. Matter proceeded ex-parte against respondent No. 1.

04. Respondent No. 2 filed written statement and contested the claim. It has denied all the averments in the petition. Age, occupation and income of the claimant has been denied. It is denied that he has suffered permanent disability. It is also denied that the said accident had taken place due to the sole negligence on the part of Tanker driver. Statutory defences have been taken and it has been specifically pleaded that the driver of the Tanker was not holding valid and effective driving license on the date of the accident.

05. After the issues were framed, claimant has led oral as well as documentary evidence. No evidence was led by respondent. Taking into consideration the evidence and hearing both sides, the learned Tribunal has come to the conclusion that the accident had taken place due to the sole negligence of Tanker driver. Respondent No. 2 has failed to prove breach of terms of policy and therefore, both the respondents are liable to pay compensation jointly and severally. It has also been held that claimant has sustained permanent physical disability due to the said accident. Respondents have been directed to pay compensation of Rs. 13,00,000/- with interest @9% p. a. Insurance company has challenged this award in this appeal.

06. Heard learned Advocate Shri. S. G. Chapalgaonkar for appellant, learned Advocate Shri. N. C. Garud for respondent No. 1 and learned Advocate Shri. Khutwad for respondent No. 2.

07. It has been vehemently submitted on behalf of appellant that appeal has been filed on two grounds. One is that the offending Tanker had no fitness certificate on the date of accident, which was mandatory for it to take before bringing the Tanker on road. The fitness certificate of the

Tanker was valid up to 2006 only. Second ground is that the learned Tribunal erred in taking the 50 % permanent physical disability as 100 % loss to the claimant and calculation based on such wrong assumption. It was prayed on behalf of appellant that it may be held that at the most, claimant has sustained 50 % of earning capacity and insurance company should be exonerated from payment of compensation amount on account of breach of terms of policy conditions.

08. Both the learned advocates appearing for respondent supported the reasons given by learned Tribunal.

09. It can be seen from the submissions that the insurance company has not challenged the finding of the learned Tribunal that the said accident had taken place due to the sole negligence of Tanker driver. Taking into consideration the scope of the appeal and the submissions made, following points arise for determination, findings and reasons are the same.

POINTS:

1. Whether the Tribunal was justified in concluding that the 50% physical disability

sustained by claimant has turned into 100% financial loss to him?

2. Whether there is breach of terms of policy by respondent No. 1?

REASONS

POINT NO. 1 :

10. Claimant has examined himself and in support of his claim, he has examined CW 2 Dr. Vijay Patil. The disability certificate has been produced at Ex. 29. The right leg of the claimant has been amputated below knee, therefore, his physical disability has been assessed at 50 %. Claimant had come with a case that he was serving with Crompton Greaves Company as well as he used to take education. He has not stated in his petition as to what was the nature of his job. In his affidavit-in-chief also he has not given the details, nor he has named the company. He has produced certificate issued by one M. M. Gandhe Company, but he has not examined anybody to prove the said certificate. However, in his cross taken by respondent No. 2, the claimant has stated that he was serving as helper with Crompton Greaves Company. Thus, the occupation of claimant has been extracted by the respondent. If

claimant was serving as helper, then with right leg amputated below knee, definitely, it can be said that he will not be able to do the same job now. Job of helper requires lifting of weight, loading and unloading of articles and standing for a long period. Claimant will not be able to do that. Hence, the learned Tribunal was justified in considering the 50 % permanent physical disability as 100 % loss of income. Learned Advocate for appellant has relied on the decision in **Raj Kumar v/s. Ajay Kumar and another [(2011) 1 SCC 343]**; wherein it has been held that, *"Tribunal should not mechanically apply percentage of permanent physical disability as percentage of economic loss or loss of earning capacity, but must assess functional disability"*. This ratio can not be disputed. Even after applying the said ratio, it can be said that claimant will not be able to do the same job which he used to do prior to accident and therefore, it amounts to total loss of earning capacity. The compensation computed on the basis of loss of total earning capacity is correct. Point is therefore, answered accordingly.

POINT NO. 2:

11. Respondent No. 2 – Insurance company contends that there was no fitness certificate of the offending vehicle at the time of accident, which

ought to have taken by the owner and on that count there is breach of terms of conditions of policy. Evidence on record shows that the fitness certificate was valid till 2006 only. Tribunal has rightly held that if the certificate was valid till 2006, then why and how the policy was issued to respondent No. 1. The period covered under the policy in this case is from 18-11-2011 to 17-11-2012. Thus, after about 6 years of said fitness certificate, the policy was issued, that too for a period of one year. Respondent No. 2 has not stated as to which documents were produced by respondent No. 1 and demanded by the company at the time of taking policy. Merely by saying that respondent No. 1 was duty bound to take it, the responsibility of insurance company does not come to an end. Unless the documents were in order, respondent No. 2 can not be said to be justified in issuing the policy. Respondent No. 2 has not led any oral evidence to explain the circumstances in which the policy was issued. Certainly, it could not have been issued in forced circumstances. Therefore, when it was in a position to refuse to extend the insurance cover, but it was given, respondent No. 2 can not now blame respondent No. 1 for not fetching fitness certificate, though it was mandatory. Here under these circumstances, it can not amount to fundamental breach of terms of policy, requiring

exoneration of the company. Hence, there is no error on the part of the learned Tribunal in holding respondent No. 2 liable to pay compensation to claimant, jointly and severally with respondent No. 1. Point is therefore, answered accordingly.

12. In view of the above said reasons, it can be said that there was no error or illegality committed by learned Tribunal in passing the impugned judgment and award. It requires no interference. There is no merit in this appeal, hence it stands dismissed with costs.

(Smt. Vibha Kankanwadi)
JUDGE

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