IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 52 OF 2009

Bhura s/o Raosu Pawar,
age 39 years, occ.service,
at present Bed Ridden,
R/o Parbhani, Dist. Parbhani ...Appellant
[Orig. Claimant]

VERSUS

1] Mr. Syed Hanif s/o Syed
Shakoor Kadari,
age 43 years, occ. Business,
R/o Chaprashi Colony, Jintur,
District Parbhani,

2] United India Inssurance Co. Ltd.,
Through its Branch Manager,
Branch Dayawan Complex,
Station Road, Parbhani ...Respondents

...

Shri Sachin Deshmukh, advocate for Appellant
Shri S.G.Chapalgaonkar, advocate for Resp. no. 2
Shri A.S.Lomte, advocate for Resp. no. 1

...

CORAM : SUNIL K.KOTWAL, J.

DATE OF RESERVING THE JUDGMENT : 10.12.2018
DATE OF PRONOUNCEMENT OF JUDGMENT : 04.01.2019

J U D G M E N T :

This appeal is directed by original claimant for enhancement of compensation, against the judgment and award, passed by the Motor Accident Claims Tribunal, Parbhani, in Motor Accident Claim Petition No. 108 of 2005.

2. Respondent no.1 is owner of the offending vehicle and respondent no.2 is insurer of that vehicle.

3. Facts leading to institution of this appeal are that on 1.5.2005, when claimant was riding his motor cycle MH-22/E-5136 by road, that time near village Zari, offending Jeep No. MH-12/PA-9348 came from opposite direction and dashed against the motor cycle of the claimant. In that accident, the claimant sustained severe injuries, which resulted into permanent disability. Therefore, claimant filed claim petition for compensation against the owner and insurer of offending vehicle.

4. After considering the evidence placed on record, the Tribunal held that even the claimant contributed 50 per cent negligence for occurrence of the accident. In the result, award was passed

for compensation of Rs.1,78,000/- with interest at the rate of six per cent per annum and joint and several liability was saddled on respondent nos. 1 and 2. The said award is challenged by the claimants in the present appeal.

5. Heard Shri Sachin Deshmukh, learned counsel for the appellant and Shri S.G.Chapalgaonkar, learned counsel for respondent no.2 insurance company.

6. Learned counsel for the claimant submits that on the date of accident the injured was 36 years old young person and he was permanent employee in I.T.I. College as peon. In addition to this, the claimant used to work as home guard.

Next contention of learned counsel for the claimant is that the claimant was hospitalized from 1.5.2005 to September, 2005. However, the Tribunal awarded meager compensation under the head of loss of income during the period of hospitalization.

Next limb of argument of learned counsel for claimant is that all medical bills submitted by the claimant are not considered by the Tribunal and meager compensation is awarded under the head of medical expenditure. He fairly submits that even after sustaining permanent disability, the claimant continued his service, and therefore, no compensation can be awarded under the head of loss of future income. However, he assailed the judgment of Tribunal on the ground that though no evidence has been brought on record by the insurance company to prove contributory negligence of the claimant, the Tribunal wrongly held that even the claimant contributed 50 per cent negligence in occurrence of the accident, along with the driver of the offending Jeep. He placed reliance on **"Minu Raut and another vs Satya Pradyumna Mohapatra and others" [(2013) 10 SCC 695], "Syed Sadiq and others vs Divisional Manager, United India Insurance Company Limited" [(2014) 2 SCC 735], "Jitendra Khimshankar Trivedi vs Kasam Daud Kumbhar and others" [(2015) 4 SCC 237]**, and **"Mangala Ram vs Oriental Insurance Company Limited and others" [(2018) 5 SCC 656].**

7. Learned counsel for insurance company submits that as the claimant continued service even after sustaining accidental injuries, no compensation can be awarded under the head of loss of future earning due to permanent disablement.

Contention of learned counsel for insurance company is that the Tribunal awarded just and reasonable compensation under the head of diet, attendant charges, pain and suffering as well as medical expenditure. Therefore, compensation cannot be enhanced as claimed by the claimant. However, he has not disputed the genuineness of bills of medicine filed by the claimant.

Learned counsel for the insurance company has pointed out that Dr. Ghodke (PW 2) has issued two disability certificates showing different percentage of disability on different dates of examination.

Next contention of learned counsel for insurance company is that as head on collision in between the Jeep and motor cycle of the injured on the middle portion of the road is proved on the basis of spot panchanama, the Tribunal rightly held that even the claimant contributed negligence for the occurrence of the accident.

8. Before considering correctness of quantum of compensation awarded by the Tribunal, I prefer to consider the correctness of finding given by the Tribunal regarding contributory negligence of the claimant in occurrence of the accident.

9. Undisputedly, in the case at hand, except oral evidence of injured claimant and police papers, no other evidence is available to prove the occurrence of the accident. Though insurance company has taken the plea of contributory negligence of the claimant, to substantiate that contention, neither the driver of the offending Jeep nor any eye witness is examined by the insurance company.

10. In "**Managing Director, Mazgaon Docks Ltd. Vs Vinodbhai Mohanlal Patel [2010 ALL MR (Supp) 31]**", this Court has taken view that onus to prove

the contributory negligence is on the party pleading the same and driver of the offending Jeep is the best witness to controvert evidence of the claimant. The non-examination of driver is sufficient to draw adverse inference against the party pleading contributory negligence of the claimant.

11. In the case at hand, in written statement in para 23, the insurance company merely pleaded that it was the case of head on collision between two vehicles and at the time of accident, the claimant drove his motor cycle with high speed and gave dash to the Jeep, and therefore, at the most Jeep driver is responsible only for 50 per cent compensation.

12. It is to be noted that after going through the judgment, passed by the Tribunal, the Tribunal has made out the case on the basis of spot panchanama that because the accident occurred on the middle portion of the road, and because there was head on collision in between Jeep and motor

cycle of the claimant, it was the case of contributory negligence by the claimant. However, in the pleading of insurance company, it has nowhere pleaded that the accident occurred on the middle portion of the road. The allegation of the insurance company is only regarding driving of the motor cycle by claimant in high speed and nothing more. Thus, obviously the Tribunal has made out case, which is not at all pleaded by the insurance company.

13. On the other hand, claimant Bhura Pawar (PW 1) categorically deposed before the Tribunal that at the time of accident he was driving the motor cycle in moderate speed by abiding the rules of road. However, the offending Jeep came in high speed and though claimant lowered down the speed of motor cycle and took it to left side of the road, the Jeep had given tremendous dash to the motor cycle. Despite searching cross-examination by learned counsel for insurance company nothing could be elicited from the cross-examination of claimant PW 1 to prove the contention of contributory

negligence of the claimant. In the circumstances, non-examination of driver of the offending Jeep by the insurance company as well as by owner of the Jeep is certainly sufficient to draw adverse inference against the respondents to hold that the accident occurred only due to rash and negligent driving by the driver of the offending Jeep and the claimant did not contribute the occurrence of the accident.

14. Even the spot panchanama of the occurrence, which is admitted by the insurance company only shows that the offending Jeep was found on the middle portion of the road in oblique direction and the motor cycle was lying in front of the Jeep at a distance of 2 feet from the left tyre of the Jeep. Thus, merely on the basis of such situation on the spot regarding position of the vehicles, inference cannot be drawn that the claimant contributed occurrence of the accident. Even the Apex Court in **"Syed Sadiq and others vs Divisional Manager, United India Insurance Company Limited"** (supra) held that because accident took place in middle of

the road, in absence of any evidence to prove the same, conclusion cannot be drawn that claimant contributed occurrence of the accident.

15. In “**Mangala Ram vs Oriental Insurance Company Limited and others**” (supra), again Apex Court held that merely on the basis of site map, in absence of legal evidence, Court cannot hold that the claimant contributed the occurrence of the accident.

16. Thus, in absence of evidence of the driver of the offending Jeep, merely on the basis of vague spot panchanama and position of vehicles on the road, conclusion cannot be drawn that the claimant contributed the occurrence of the accident. I hold that the insurance company failed to prove that the accident occurred due to contributory negligence of the claimant. The finding of the Tribunal regarding occurrence of the accident due to 50 per cent contribution on the part of the claimant is absolutely erroneous and deserves to be set aside.

17. While considering the quantum of compensation to be awarded to the claimant, I must make clear the legal position as to how the quantum of compensation can be determined. In **“Raj Kumar vs Ajay Kumar and another” [2011 (2) Mh.L.J. 569]**, the Apex Court has specified the heads under which compensation is awarded in personal injury cases. Those heads are as under :

> “ Pecuniary damages (Special Damages)
>
> (i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.
> (ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising :
> (a) Loss of earning during the period of treatment;
> (b) Loss of future earnings on account of permanent disability.
> (iii) Future medical expenses.
>
> Non-pecuniary damages (General Damages)
>
> (iv) Damages for pain, suffering and trauma as a consequence of the injuries.
> (v) Loss of amenities (and/or loss of prospects of marriage).
> (vi) Loss of expectation of life (shortening of normal longevity). “

In that case, the Apex Court held that in routine personal injury cases compensation will be awarded only under the heads medical expenses relating to the treatment, hospitalization, medicines, transportation, nourishing food, loss of earnings during the period of treatment and damages for pain, suffering and trauma as a consequence of injury. Only in serious cases of injury, where there is specific medical evidence corroborating the evidence of claimant, compensation will be granted under the head of loss of future earning on account of permanent disability, future medical expenses, loss of amenities and loss of expectation of life.

18. In this case, the Apex Court made it clear that the percentage of permanent disability with reference to the whole body of a person cannot be assumed to be percentage of loss of earning capacity. The loss of earning capacity is to be determined after considering the occupation of the claimant and the effect of permanent disability on the earning capacity of the claimant. The Apex Court has summarized the principles as under :

> “(i) All injuries (or permanent disabilities arising from injuries), do

not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors. "

19. In the case at hand, by examining Dr. Pratap Ghodke (PW 2), who works as Orthopedic Surgeon at Civil Hospital, Parbhani since March, 2003, the claimant has proved two permanent disability certificates. The permanent disability certificate (Exh.38), dated 24.8.2007 shows 50 per cent permanent disability and second certificate

(Exh.39), dated 7.12.2005 shows 24 per cent permanent disability. However, the doctor has admitted in his cross-examination that in both the disability certificates, description of injuries specified is similar. In his evidence, he has given explanation for difference in the percentage of two disability certificates on the ground that despite previous treatment to the claimant, he was required to undergo two surgical operations, which were not successful and in the result the length of extremity was further reduced about 3 inches as well as there was increase in restriction of knee movement.

20. Therefore, over much importance cannot be given to the variance into two disability certificates, as the doctor has given proper explanation for the same. Otherwise also, Dr. Ghodke (PW 2) was the Orthopedic surgeon in Civil Hospital, Parbhani where the claimant was admitted after the occurrence of the accident. From the evidence of Dr. Ghodke (PW 2), it emerges that from Civil Hospital, Parbhani, the claimant was referred

to the Government Medical College, Aurangabad. Thereafter, the claimant returned back and was again treated at Civil Hospital, Parbhani. Thereafter, he was treated in Jintoorkar Hospital at Jalna. Again he came to Civil Hospital, Parbhani for treatment. Thereafter, the claimant went to Bombay for his treatment with Dr. Taral Nagada. Again, the claimant came to Parbhani and received treatment at Civil Hospital, Parbhani on OPD basis. Thus, it emerges that since the occurrence of accident, for years together till 2007, the claimant has undergone treatment for the injuries sustained to his both legs in above said accident. The claimant was not fully recovered and the permanent injury resulted into shortening of his leg. Thus, I have no hesitation to hold that on the basis of evidence of Dr. Prakash Ghodke (PW 2), the claimant has duly proved that the accidental injuries resulted into permanent disability i.e. shortening of his leg. Dr. Ghodke (PW 2) has made it clear that due to disability the claimant cannot stand on his leg and he cannot walk.

21. However, from the cross-examination of claimant PW 1, it emerges that despite his permanent disability, he was not removed from his service and till the date of deposition he was in the service. Thus, no compensation can be awarded to the claimant under the head of loss of future income due to permanent disability.

22. The accident occurred on 1.5.2005 and initially claimant was admitted in Civil Hospital, Parbhani and subsequently he was referred to the Government Hospital, Aurangabad for better treatment. According to the claimant Bhura (PW 1) he was hospitalized at Parbhani from 2.5.2005 to 8.5.2005 and thereafter was admitted in Government Hospital, Aurangabad. However, claimant has not made it clear as to for how many days he was hospitalized at different Hospitals. The discharge card issued by Parakh Hospital, Bombay shows that claimant was admitted from 10.7.2006 and discharged on 26.7.2006. Again claimant was admitted on 21.11.2006 and discharged on 25.11.2006. The Government Hospital, Parbhani issued certificate

that claimant was admitted on 11.5.2005 and discharged on 15.5.2005. Thus, on the basis of this documentary evidence, at the most period of hospitalization of the claimant can be determined for the period of 32 days. However, the claimant, in his entire evidence, has not made it clear that whether during the period of hospitalization, his absence was treated as leave without pay or he received medical leave during this period with salary. Therefore, no compensation can be awarded to the claimant for actual loss of income during the period of hospitalization.

23. However, it cannot be ignored that as claimant was hospitalized for 32 days, somebody must have attended him in the hospital. By guess work, the attendant charges are determined at the rate of Rs.500/- per day. Thus, for 32 days, the claimant is entitled to compensation of Rs.32x500=16000/-.

24. As deposed by Dr. Ghodke (PW 2), claimant was required to take treatment at Parbhani,

Aurangabad, Bombay, Jalna at various occasions. Therefore, under the head of transportation charges, reasonable compensation of Rs.20,000/- needs to be awarded.

25. So also, considering the period of hospitalization and surgeries undergone by the claimant, compensation of Rs.20,000/- needs to be awarded under the head of nourishing food.

26. For the prolonged treatment obtained by the claimant for his accidental injuries, he has filed medical bills worth Rs.3,22,359/-. During the course of arguments, the learned counsel for insurance company has not disputed the genuineness of these bills, though he verified those bills from record. Therefore, under the head of medical expenditure, compensation of Rs.3,22,359/- deserves to be granted.

27. Dr. Ghodke (PW 2) nowhere deposed regarding future medical expenditure. Therefore, no compensation can be awarded under the head of

future medical expenditure.

28. However, as Dr. Ghodke (PW 2) has proved the shortening of leg of the claimant and as he stood constant on his opinion that due to permanent disability the claimant cannot stand or walk, under the head of loss of amenities, compensation of Rs.1,00,000/- deserves to be awarded.

29. Considering the nature of injuries sustained by the claimant and surgeries undergone by him, compensation of Rs.50,000/- needs to be awarded under the head of pains, suffering and trauma.

30. Considering the nature of permanent disability sustained by the claimant, there is no likelihood of shortening of life span of the claimant. Therefore, no compensation can be awarded under the head of loss of expectation of life.

31. Thus, the claimant is entitled to following total compensation under different heads.

Attendant charges	:	Rs. 16000/-
Transportation charges	:	Rs. 20000/-
Nourishing Food	:	Rs. 20000/-
Medical expenditure	:	Rs. 322359/-
Loss of amenities	:	Rs. 100000/-
Pain, Suffering and Trauma	:	Rs. 50000/-
Total	:	Rs. 528359/-

32. As claimant was compelled by the insurance company to knock the doors of this Court for getting fair and reasonable compensation, the claimant is also entitled to interest on the compensation amount at the rate of nine per cent per annum from the date of filing of claim petition till realization of the compensation amount.

33. As the respondents failed to prove contributory negligence of the claimant in the above said accident, respondent nos. 1 and 2 are jointly and severally liable to pay this entire compensation to the claimant.

34. In view of this discussion, I hold that the appeal filed by the claimant deserves to be allowed.

35. Accordingly, First Appeal No. 52 of 2009 is partly allowed. The award, passed by the Motor Accident Claims Tribunal, Parbhani, in Motor Accident Claim Petition No. 108 of 2005 is modified to enhance the compensation of Rs.5,28,359/- with interest at the rate of nine per cent per annum from the date of filing of claim petition till realization of the compensation amount.

Respondent nos. 1 and 2 are jointly and severally liable to pay this compensation to the claimant.

Award be modified in above said terms.

36. Parties to bear their respective costs of the appeal.

37. Deficit court fee, if any, be recovered from the appellant.

38. Appeal is disposed of in above terms.

[**SUNIL K.KOTWAL, J.**]

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