

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.301 OF 2013

National Insurance Co. Ltd.	)	
Mumbai Regional Office I,	)	
5 th Floor, Sterling Cinema Bldg,	)	
65, Murzban Road, Fort,	)	
Mumbai – 400 020.	)	.. Appellant

Versus

1. Bhagwan Bhika Shirsath	)	
Age : Major, Occ. -Transport,	)	
R/o. Near Shrikrishna Society,	)	
Naveen Vasahat, Soygaon,	)	
Tal. Malegaon, Dist. Nashik.	)	
2. Ravindra Govind Borse	)	
Age : Major, Occ. - Truck Owner,	)	
R/o. Antapur, Tal. Satana,	)	
Dist. Nashik.	)	
3. Somnath Pandharinath Jadhav	)	
Age : Major, Occ. - Truck Owner,	)	
R/o. Antapur, Tal. Satana,	)	
Dist. Nashik.	)	.. Respondents

**ALONG WITH
CIVIL APPLICATION NO.1520 OF 2019
IN
FIRST APPEAL NO.301 OF 2013**

Bhagwan Bhika Shirsath	)	
Age : 38 years, Occ. Nil	)	
R/at Anand Nagar, Near Primary	)	
Health Service Centre, Soygaon,	)	
Malegaon, Dist. Nashik- 423 203.	)	.. Applicant

Versus

1. National Insurance Co. Ltd.	)
Mumbai Regional Office I,	)
5 th Floor, Sterling Cinema Bldg,	)

65, Murzban Road, Fort,
Mumbai – 400 020.

)
)

2. Ravindra Govind Borse
Age : Major, Occ. - Truck Owner,
R/o. Antapur, Tal. Satana,
Dist. Nashik.

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3. Somnath Pandharinath Jadhav
Age : Major, Occ. - Truck Owner,
R/o. Antapur, Tal. Satana,
Dist. Nashik.

)
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)
)

.. Respondents

Mr.Amol A. Gatne for the appellant.

Mr.J. D. Khairnar for the applicant/respondent no.1.

CORAM : R.D.DHANUKA, J.
DATE : 27th February 2020

Judgment:-

. By this appeal filed under Section 173 of the Motor Vehicles Act, 1988, the appellant (original opponent no.3) has impugned the judgment and award dated 28th March 2012 passed by the MACT, Malegaon in MACP No.36 of 2006 allowing the claim application filed by the respondent no.1 partly and directing the appellant and the respondent nos.2 & 3 (original opponent nos.1 & 2) to jointly and severally pay compensation amount of Rs.15,50,000/- to the respondent no.1 (original claimant) with interest @8% p.a. from the date of filing of the claim petition till realisation.

2. Learned counsel for the appellant states that since dispute is only in respect of quantification, notice upon the respondent nos.2 and 3 may be dispensed with. Statement is accepted. Notice upon the respondent nos.2 and 3 is accordingly dispensed with.

3. By consent of the appellant and the respondent no.1, First Appeal is heard finally at the stage of admission. Some of the relevant facts for the purpose of deciding this First Appeal are as under : -

4. The respondent no.1 (original claimant) was resident of Soygaon, Malegaon and used to drive goods carrier rickshaw at the time accident. On 19th May 2005, at about 11.00 a.m. on Malegaon to Satara road near village Lakhmapur, when the respondent no.1 was driving his motor cycle No.MH-41 2583 from Malegaon to Satara side, his mother was on the pillion seat. A truck bearing No.MH-15 B-914 driven by the respondent no.3 Somnath came from opposite direction and while trying to overtake another vehicle did not control the truck and came to wrong side of the road and dashed motor cycle of the respondent no.1. Mother of the respondent no.1 died on the spot. Right leg of the respondent no.1 was crushed by the said offending vehicle. The respondent no.1 was admitted to Vaidya Hospital at Malegaon and was then shifted to Suyash Hospital. His right leg had to be amputated. The respondent no.1 was shifted to Satyam Hospital and then to Rohit Hospital.

5. It was the case of the respondent no.1 that he was treated as indoor patient for about 50 to 55 days and spent lot of amounts towards medical treatment. The respondent no.1 made claim for compensation in the sum of Rs.19,76,000/- jointly and severally against the respondent nos.2 and 3. The appellant filed its written statement and denied the claim made by the respondent no1. The Tribunal framed three issues for determination.

6. The respondent no.1 examined himself and another witness Mr.Suresh. The appellant did not examine any witness. Tribunal passed judgment and award dated 28th March 2012 allowing the claim made by the respondent no.1 partly. The said judgment and award is impugned in this First Appeal.

7. Mr.Gatne, learned counsel for the appellant invited my attention to some of the findings rendered by the Tribunal and would submit that though the respondent no.1 himself was negligent in driving the motorcycle, the Tribunal has directed the appellant to pay compensation to the respondent no.1. The Tribunal did not hold the respondent no.1 liable for any part of contributory negligence.

8. The next submission of the learned counsel for the appellant is that though the respondent no.1 had not produced any proof of income

alleged to have been earned from business of driving the goods carrier rickshaw. Even if the Tribunal could have awarded the compensation, the Tribunal could not have considered notional income more than Rs.6,000/- per month. In support of this submission, learned counsel placed reliance on various paragraphs of the judgments relied upon by the Tribunal. He relied upon the judgment of the Supreme Court in the case of ***Rani and Others Vs. National Insurance Company Limited & Ors. (2018) 8 SCC 492*** and in particular paragraph 4 thereof and the judgment of the Supreme Court in the case of ***Laxmi Devi and Others Vs. Mohammad Tabbar & Anr., (2008) 12 SCC 165*** and in particular paragraphs 1 and 7 thereof. He submits that the Supreme Court in both these judgments have considered the notional income at lower side while considering the income by the Tribunal in those cases.

9. Learned counsel for the appellant invited my attention to the evidence of the respondent no.1 and more particularly his cross-examination in support of the submission that the respondent no.1 failed to produce any proof in support of his income in the sum of Rs.300 to Rs.500/- per day and thus the Tribunal could not have considered the notional income of Rs.6,000/- per month.

10. It is submitted by the learned counsel that even if it was proved by the respondent no.1 that the respondent no.1 was the owner of

the goods carrier rickshaw, that cannot be the basis for determining loss of dependency and more particularly in this case @Rs.6,000/- per month. The respondent no.1 was already withdrawn a sum of Rs.12,00,000/- out of the amount deposited by the appellant.

11. Mr.Khairnar, learned counsel for the respondent no.1, on the other hand, invited my attention to the findings rendered by the Tribunal in paragraphs 13 to 15 in support of the submission that the Tribunal has recorded a finding of fact that the driver of the offending vehicle was solely responsible for the said accident due to which right leg of the respondent no.1 was required to be amputated. The respondent no.1 being an owner was driving the said vehicle himself and in view of the right leg of the respondent no.1 was amputated, he has not carried on the said business. He submits that driver of the offending vehicle has not been examined and thus the findings of the Tribunal on the issue of contributory negligence cannot be faulted with.

12. In so far as the issue of quantification of claim is concerned, it is submitted that the respondent no.1 has produced all original bills in support of his claim for reimbursement of medical expenses incurred by his client which are marked as exhibits before the Tribunal. The findings of facts based on the evidence thus cannot be faulted with.

13. In so far as the submission made by the learned counsel for the appellant that the Tribunal could not have considered the monthly income of the respondent no.1 @Rs.6,000/- per month is concerned, learned counsel invited my attention to the evidence led by his client and would submit that ownership of the respondent no.1 in respect of the said vehicle was proved before the Tribunal. He submits that the fact that respondent no.1 was carrying on business was also proved. For such a small business, he was not required to maintain the record of his monthly income. In support of this submission, learned counsel placed reliance on the judgment of this Court in the case of ***United India Insurance Company Limited Vs.Ujwala Salgaonkar & Ors., 2020 SCC OnLine Bom 58*** and in particular paragraph 7 thereof.

14. Learned counsel also placed reliance on the latest judgment of the Supreme Court in the case of ***Kajal Vs. Jagdish Chand & Ors., 2020 SCC OnLine SC 127*** and in particular paragraphs 14 to 22 and would submit that the Hon'ble Supreme Court in the said judgment has considered the income of student @Rs.4846/- per month being minimum wages payable to a skilled worker. He submits that the Supreme Court in the said judgment clearly held that the assessment of damages in personal injury cases raises great difficulties. It is not easy to convert the physical and mental loss into monetary terms. There has to be a measure of calculated guess work and conjecture. An assessment, as best as can, in

the circumstances, should be made. He submits that at the time of accident, the respondent no.1 was only 25 years old. His right leg was admittedly amputated. He distinguishes the judgments of the Supreme Court relied upon by the learned counsel for the appellant and submits that the said judgments of the Supreme Court would not assist the case of the appellant.

15. Learned counsel for the respondent no.1 distinguishes the judgment of the Supreme Court in the case of ***Kajal (supra)*** on the ground that the Supreme Court had considered the case of a student who had met with an accident. The facts before the Supreme Court were different and thus clearly distinguishable in the facts of this case.

16. It is not in dispute that the respondent no.1 had met with accident due to rash and negligent driving of Truck bearing No.MH-15 B-914 which was insured with the appellant. The respondent no.1 himself has entered the witness box and proved beyond the reasonable doubt as to how the accident had taken place. The driver of the offending vehicle was solely responsible for rash and negligent driving which caused the said accident resulting in amputating the right leg of the respondent no.1. Though the appellant had raised an issue of contributory negligence before the Tribunal, the appellant did not examine any witness. In my view, the finding of fact thus rendered by the Tribunal holding the driver

of the offending vehicle solely responsible for rash and negligence driving does not warrant any interference by this Court.

17. In so far as the submission of the learned counsel for the appellant that even if the respondent no.1 had proved the ownership of goods carrier rickshaw, that could not be the basis for determining loss of dependency is concerned, in my view, there is no merit in the submission of the learned counsel for the appellant. In this case, the respondent no.1 had entered the witness box and had also examined Mr.Suresh (PW-2) as one of the witnesses. The respondent no.1 in his evidence had deposed that he was carrying on business of driving the goods carrier rickshaw. His depositions in the examination-in-chief was not shattered in the cross-examination on the aspect of the respondent no.1 carrying on the said business of driving goods carrier rickshaw.

18. PW-2, Suresh was examined by the respondent no.1 as another witness who deposed that the respondent no.1 owned three wheeler goods rickshaw. The said witness also owned a shop of tin sheets. His customers from nearby villages used to take tin sheets purchased from his shop in the rickshaw of the respondent no.1 to their homes. The respondent no.1 used to load tin sheets in the rickshaw and drive rickshaw himself. The said witness also deposed that the respondent no.1 could be earning Rs.350/- to Rs.450/- per day at the time of accident.

There were about 15 shops nearby the shop of this witness selling tin sheets or tiles. He also deposed that he never saw the respondent no.1 driving rickshaw after the said accident.

19. It is thus clear beyond the reasonable doubt that the respondent no.1 was not only the owner of the said three wheeler goods delivery rickshaw but also carrying on business of transport of various materials. The respondent no.1 himself was driving the said vehicle. Submission of Mr.Gatne, learned counsel for the appellant that merely because the ownership of the said vehicle was proved by the respondent no.1, that would not be conclusive to show that the respondent no.1 was earning any income out of the said vehicle is contrary to the evidence produced on record by the respondent no.1.

20. In so far as the submission of the learned counsel for the appellant that the Tribunal could not have considered the income of Rs.6,000/- per month on the ground that no proof of income was produced by the respondent no.1 in his evidence and at most Rs.3,000/- would be considered as and by way of notional income is concerned, it was the case of the respondent no.1 in the evidence as well as in the claim that he was earning Rs.300/- to Rs.500/- per day from the said business. PW-2, Suresh examined by the respondent no.1 also in his evidence deposed that the respondent no.1 could earn Rs.350/- to Rs.450/- per day

at the time of accident. Judgment relied upon by the learned counsel for the appellant in the case of ***Laxmi Devi and Others Vs. Mohammad Tabbar & Anr.(supra)*** holding that Rs.3,000/- per month as and by way of notional income appears to be correct would not assist the case of the appellant. There was no proof of income produced by the claimant in that case before the Supreme Court for consideration. Judgment of the Supreme Court in the case of ***Laxmi Devi and Ors.Vs. Mohammad Tabbar & Anr. (supra)*** is clearly distinguishable in the facts of this case and would not advance the case of the appellant.

21. Supreme Court in the case of ***Rani and Others Vs. National Insurance Company Limited & Ors.(supra)*** has considered the monthly income of Rs.5,000/- per month. In this case, there was a specific evidence led by the respondent no.1 and another witness examined by him. The said judgment would not assist the case of the appellant but would assist the case of the respondent no.1.

22. This Court in the case of ***United India Insurance Company Limited Vs.Ujwala Salgaonkar & Ors. (supra)*** has held that for such small business, maintenance of record of an employee is not expected and therefore, merely on the ground of non-production of papers regarding payment of salary, cannot be a ground to disbelieve the evidence of the employer. I am not inclined to accept the submission of

the learned counsel for the appellant that the Tribunal, in this case while considering the evidence on record, could not have awarded notional income more than Rs.6,000/- per month.

23. In a recent judgment of the Supreme Court in the case of ***Kajal Vs. Jagdish Chand & Ors. (supra)***, the Supreme Court has clearly held that the assessment of damages in personal injury cases raises great difficulties. It is not easy to convert the physical and mental loss into monetary terms. There has to be a measure of calculated guess work and conjecture. An assessment, as best as can, in the circumstances, should be made. Supreme Court, in that judgment, has quoted McGregor's Treatise on Damages, 14th Edn., para 1157, referring to heads of damages in personal injury actions with approval and has awarded substantial amount of damages under various heads to a person physically injured in accident. In this case, the respondent no.1 was driving the said commercial vehicle which was his only source of income and due to the accident, his right leg was amputated and suffered 75% permanent disability. The Tribunal has thus rightly considered compensation under various heads.

24. Learned counsel for the respondent no.1 could not point out any infirmity allowing compensation under the other heads of compensation allowed by the Tribunal to the respondent no.1. In my

view, principles of law laid down by the Supreme Court in the case of ***Kajal Vs. Jagdish Chand & Ors. (supra)*** would apply to the facts of this case. The proof of compensation or for reimbursement of medical expenses in case of claim for compensation arising out of Motor Vehicles Act, 1988 cannot be required to prove what is required in the commercial matters. Such claim for compensation has to be a just compensation and has to be determined in terms of the provisions of the Motor Vehicles Act, 1988. There has to be a measure of calculated guess work and conjecture. Strict provisions of the Evidence Act does not apply in such cases. In my view, the Tribunal has rightly considered the claim made by the respondent no.1 substantially. The findings of facts rendered by the Tribunal do not warrant any interference. Appeal is devoid of merit and is accordingly dismissed. In view of dismissal of the First Appeal, pending civil applications, if any, do not survive and are accordingly disposed of.

25. The respondent no.1 would be at liberty to withdraw the entire amount with interest deposited by the appellant before the Tribunal after giving credit of the amount already withdrawn on production of an authenticated copy of this order.

26. If there is any shortfall in depositing the amount by the appellant, the appellant shall deposit the said shortfall amount within two

weeks from the date of computation of the said amount by the Tribunal. If there is any surplus left after payment of decretal amount, the same shall be refunded to the appellant. Office is directed to transmit the statutory deposit of Rs.25,000/- to the concerned Tribunal expeditiously. Parties as well as the concerned Tribunal to act on the authenticated copy of this order.

R.D.DHANUKA, J.