

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

FIRST APPEAL NO. 79 OF 2021

The New India Assurance Co. Ltd.
Panvel Branch (170201)
Pookya Sindhi Panchyat Bldg. 1st Floor,
M. G. Road, Near Hotel Panchratna,
Dist. Raigad, Navi Mumbai – 410 206
Through Mumbai Legal Hub,
41-B, 4th Floor, Maker Tower – E,
Near World Trade Centre, Cuffe Parade,
Mumbai – 400 005.

...Appellant
(Ori. Insurer)

Versus

1. Mr. Dhruv Narayan Lalchand Prasad
Age : 44 years present, Occu. Not
known, 18, Ganesh Nagar, Mohd.
Jamal Chawl, Nehru Nagar, Kurla,
Mumbai – 24.
2. Mr. Bhanudas Bahira
Age : Adult, Occ. Not Known
At Taluka Near Sky Garden,
Tal. Panvel, Dist. Raigad,
Panvel - 410206

...Respondents
(Resp.1 Ori.Claimant
Res.2 Org. opp. party)

Mr. Devndranath Joshi, for the Appellant.

Mr. Amol Gatane, i/b Ms. Swati Mehta, for the Respondents.

CORAM: N. J. JAMADAR, J.

RESERVED ON : 22nd NOVEMBER, 2021

PRONOUNCED ON : 17th DECEMBER, 2021

JUDGMENT:-

1. This appeal is directed against a judgment award dated 17th January, 2020, in MAC Application No.1311 of 2015, passed by the learned Chairman, MACT, Mumbai (“the Tribunal”),

whereby the claim of the claimant – respondent no.1 came to be partly allowed awarding a sum of Rs.39,79,700/- inclusive of the compensation under Section 140 of the Motor Vehicles Act, 1988 (“the M. V. Act”) along with interest at the rate of 8% p.a. for permanent disability suffered in a vehicular accident.

2. The background facts leading to this appeal can be stated in brief as under:

(a) The claimant – respondent no.1, who was 39 years of age, claimed that he was dealing in a business and earned Rs.20,000/- per month. On the day of accident, at about 5.30 pm., the claimant was riding motorcycle bearing registration No.MH-01/BA-8698 at Kanjade, Panvel. When he negotiated the turn opposite Chinchpada Police Chowki, Panvel, a motor dumper bearing registration No.MH-06/AQ-6945, owned by opposite party – respondent no.2 herein, and insured with appellant – insurer, came in an excessive speed from behind and gave a violent dash to him. The driver of the said offending vehicle drove the offending vehicle in a rash and negligent manner. The claimant suffered multiple injuries including crush injury on the left leg, degloving injury left leg, fracture of ankle left. The claimant was made to incur huge expenses to the tune of Rs.25,00,000/- towards medical treatment. Hence,

the claimant filed a claim for compensation to the tune of Rs.50,00,000/- under Section 166 of the MV Act.

(b) The opposite party – respondent no.2 did not appear despite service of notice and hence the application proceeded *ex parte* against respondent no.2. The appellant – insurer resisted the claim by filing its written statement (Exhibit-14). In addition to usual defences, the insurer took the defence that there was breach of condition of insurance as the driver of the offending vehicle was not holding valid and effective driving licence at the time of accident. Permit and fitness of the offending vehicle were not valid.

(c) The learned Chairman of the Tribunal recorded the evidence of the claimant and eight witnesses, in support of the claim, including doctors and administrative officers of the hospitals, where the claimant had taken the treatment. The insurer examined Rajendra Suryawanshi (DW-1); an employee of RTO, and Aditi Shekhavat (DW-2); Legal Officer of the New India Assurance Company, to substantiate its defence. After appraisal of the evidence and documents tendered for its perusal, the Tribunal was persuaded to return the finding that the accident occurred due to negligence on the part of the driver of the offending vehicle, the insurer failed to establish that there was

contributory negligence on the part of the claimant and that the driver of the offending vehicle was not holding a valid and effective driving licence. Assessing the income of the claimant at Rs.10,000/- per month and holding that the claimant suffered 100% functional disability, due to the permanent partial physical disability, and applying the multiplier of 15, the Tribunal awarded a sum of Rs.18,00,000/- towards loss of future earning. A sum of Rs.19,69,700/- was awarded towards the medical expenses, proved by the claimant. Adding thereto the amount of Rs.10,000/- towards special diet, Rs.1,00,000/- towards pain and sufferings and Rs.1,00,000/- towards loss of amenities of life, the Tribunal awarded the total compensation of Rs.39,79,700/- along with interest at the rate of 8% p.a. from the date of the application.

3. Being aggrieved by and dissatisfied with the impugned judgment and award, the insurer is in appeal.

4. I have heard Mr. Joshi, the learned Counsel for the appellant and Mr. Gatane, the learned Counsel for respondent no.1 - claimant, at length. With the assistance of the learned Counsels for the parties, I have perused the material on record including the impugned judgment, depositions of the witnesses and the documentary evidence.

5. Mr. Joshi, the learned Counsel for the appellant, submitted that though the appellant has raised multi-fold challenge to the legality, propriety and correctness of the impugned judgment and award, the principal exception is to the finding that the claimant – respondent no.1 suffered 100% functional disability. This erroneous finding has vitiated the award passed by the Tribunal, singularly, urged Mr. Joshi. Amplifying the submission, Mr. Joshi would urge that from the nature of the injuries, which the claimant – respondent no.1 claimed to have suffered, namely, crush injury, degloving injury and fracture of left ankle, in the absence of definite medical opinion that the claimant suffered 100% functional disability, the Tribunal was in gross error in recording the finding that the claimant was totally incapacitated from doing any work. It was strenuously submitted that though the claimant had examined number of medical officers, none deposed that the claimant was totally incapacitated from doing any work. What accentuated the situation, according to Mr. Joshi, was the fact that the nature of business which the claimant was dealing in, was not initially spelled out by the claimant. Even if the case of the claimant is taken at par, it cannot be said that the claimant was incapacitated from dealing in the business of modular kitchen, which case the claimant had improvised. Thus, the loss of

future income, which was determined by reckoning 100% functional disability, deserves to be interfered with, submitted Mr. Joshi. In order to lend support to this submission, Mr. Joshi placed reliance upon the judgment of the Supreme Court in the case of *Raj Kumar vs. Ajay Kumar and another*,¹ wherein the Supreme Court elucidated the manner in which the issue of assessment of disability shall be approached.

6. Per contra, Mr. Gatane, the learned Counsel for respondent no.1, submitted that, in the facts of the case, the Tribunal was within its rights in assessing the disability at 100%. Mr. Gatane would urge that it is not a case where the applicant had not at all examined the doctors who treated him. On the contrary, there is voluminous evidence on record to show that the claimant was required to be admitted in various hospitals on multiple occasions. Even the testimony of Dr. Naresh Khanna (AW-9), who had issued the disability certificate, cannot be discarded for the reason that he had not treated the claimant as the disability certificate was issued after clinical and radiological examination. Mr. Gatane, also pressed into service the disability certificate issued by the Board constituted at Sir JJ Group of Hospital and Grant Government Medical

1 (2011) 1 Supreme Court Cases 343.

College, Mumbai, wherein the disability was certified at 62% with the diagnosis that the disability suffered by the claimant was, “left tibia non union”, which was “permanent, non progressive and not likely to improve”.

7. On the aspect of the assessment of functional disability, Mr. Gatane placed reliance on the observations of the Supreme Court in paragraphs 13 and 14 of the judgment in the case of *Raj Kumar* (supra), which read as under:

“13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of ‘loss of future earnings’, if the claimant

continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not find suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.”

8. I have given anxious consideration to the rival submissions.

9. To start with, the approach expected of the Tribunals and Courts in determining the just compensation is required to be kept in view. The compensation assumes the element of justness if it has the potential to fully and adequately restore the claimant to the position prior to the accident, to the extent possible. The claimant is required to be compensated not only for the physical injury but also for his inability to lead a full life, and to enjoy the usual amenities of life and to earn as much as he used to earn or could have earned but for the injuries sustained in the accident.

10. The aforesaid approach was delineated by the Supreme Court in the case of *Govind Yadav vs. New India Insurance Co. Ltd.*² wherein after adverting to the previous pronouncements in the cases of *Arvind Kumar Mishra vs. New India Assurance Co.*

2 (2011) 10 SCC 683.

*Ltd.*³ and *Raj Kumar* (supra), the Supreme Court observed as under:

“15. In our view, the principles laid down in *Arvind Kumar Mishra v. New India Assurance Company Ltd.* (supra) and *Raj Kumar v. Ajay Kumar* (supra) must be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily. If the victim of the accident suffers permanent disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and his inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident.”

11. On the aforesaid touchstone, reverting to the facts of the case, as indicated above, the controversy revolves around the justifiability of the finding that the claimant suffered 100% functional disability. A brief recourse to the evidence would be necessary to arrive at a legitimate answer to the question sought to be raised on behalf of the insurer. Dr. Naresh Khanna (AW-9) claimed to have examined the claimant clinically and radiologically and found the following disabilities.

- “1. Tenderness c deformity c scarring of Lt. Ankle.
2. Movement of Left Ankle painful and restricted.
3. Unable to Squat, Climb Stair, Stand or walk for long.
4. Unable to do day to day activities.”

On the basis of the aforesaid injuries, Dr. Khanna assessed the partial permanent disability of the claimant at 49%.

3 (2010) 10 SCC 254.

12. The submission of Mr. Joshi, the learned Counsel for the appellant that Dr. Khanna (AW-9) was not the treating doctor was well grounded in facts. Dr. Khanna (AW-9) conceded in the cross-examination that he had not treated the claimant. The claimant had visited him for the purpose of assessment of disability and issue of disability certificate. In the light of the caution administered by the Supreme Court in paragraph 18 of the judgment in the case of *Raj Kumar* (supra), this factor assumes importance.

13. Paragraph 18 in the judgment in the case of *Raj Kumar* (supra) reads as under:

“18. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give ‘ready to use’ disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross- examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability.”

14. Indeed Dr. Khanna, who gave the disability certificate (Exhibit-63), was not the treating doctor. The question that comes to the fore is, whether there is evidence, which would sustain the finding of 100% functional disability apart from the certification of disability by Dr. Khanna (AW-9). In the case at hand, there is not only evidence of treating doctor but also the disability certificate issued by a properly constituted Board, certifying the disability at 62%, as adverted to above. Thus, the claim of the claimant of having sustained 100% disability cannot be thrown overboard, for the only reason that Dr. Khanna (AW-9) had not treated the claimant,

15. Dr. Shailesh Joshi (AW-2), Orthopedic Surgeon, who treated the claimant during the period 23rd April, 2015 to 22nd May, 2015, claimed to have found that the claimant had suffered compound fracture of tibia with exposed ankle joint and lower leg. The claimant had also suffered fracture of calcaneus and fracture of metatarsal bone of left lower limb. Dr. Shailesh Joshi (AW-2) asserted that when the claimant was discharged from the hospital on 22nd May, 2015 fracture was not united. Dr. Vikash Agashe (AW-5), the Orthopedic Surgeon, who was attached to PD Hinduja Hospital as well as Dr. Agashe's Maternity and Surgical nursing Home, informed the Tribunal

that the applicant had grade-III B open fracture tibia fibula with severe infection, loss of skin and soft tissues and necrotic bone. During the course of the cross-examination, Dr. Agashe (AW-5) stood his ground and asserted that the fracture suffered by the claimant was not united and the loss of bone between tibia and lower bone had not healed. Dr. Sitaram Prasad (AW-7), who was attached to Fortis Hospital as a Plastic Surgeon, informed the Tribunal that the claimant had plastic surgery at Fortis Hospital twice. Dr. Prasad (AW-7) did not cave in to the suggestion that when the claimant was discharged, he was physically fit.

16. In the backdrop of the aforesaid evidence, the appellant - insurer cannot draw any mileage from the fact that Dr. Khanna (AW-9), who had issued disability certificate, was not the treating doctor. To add to this, the disability certificate issued by the properly constituted Board records the disability as "left tibia non union". From this standpoint, the claim of the claimant that on account of the disability suffered in the accident he still had pain and tenderness, he was unable to walk for long distance, unable to sit cross legged, unable to squat and unable to follow daily pursuits, is required to be appreciated. It is imperative to note that the said claim of the

claimant went unchallenged during the course of the cross-examination. In the backdrop of the aforesaid injuries and the nature of evidence in support thereof, the Tribunal was justified in placing reliance on the claim of the claimant as regards the consequences which the disability entailed.

17. It is true that the Tribunal recorded in clear and explicit terms that the claimant did not succeed in establishing that he was dealing in the business of modular kitchen and earned Rs.20,000/- per month. However, the Tribunal took note of the fact that after the claimant suffered accident, the claimant did not file income tax returns for the year 2016 – 2017 though the claimant had filed returns for the year 2007 – 2008 and 2012 – 2013 to 2015 – 2016 (Exhibit-61 Colly). On the said premise, in the backdrop of the nature of the disability, the Tribunal assessed the functional disability at 100%.

18. The avocation which the claimant pursued before he suffered disability is of significance in determining the aspect of functional disability. In the case at hand, the claimant claimed that he was dealing in the business of modular kitchen. Even if the said claim is found to be not substantiated, it can be safely inferred that the claimant was a self-employed person and reported income for a number of years prior to the accident. In

the backdrop of the nature of the injury, which rendered the claimant unable to perform normal physical activities, it would be taking a very rigid view of the matter to hold that despite such debilitating disability the applicant would be able to work as a self-employed person and earn as before. It would be too harsh to expect the claimant to demonstrate that he cannot do any work at all. It is no answer that the claimant can still do some sedentary work. Viewed through this prism, in the totality of the circumstances of the case, I am not inclined to take a different view on the aspect of the functional disability suffered by the claimant.

19. The upshot of the aforesaid consideration is that no interference is warranted in the impugned judgment and award. The appeal thus deserves to be dismissed.

20. Hence, the following order:

: O R D E R :

- (i) The appeal stands dismissed with costs.
- (ii) The award be drawn up accordingly.

SANTOSH
SUBHASH
KULKARNI

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[N. J. JAMADAR, J.]