

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

FIRST APPEAL NO. 896/2008

Iqbal Husain S/o Fakruddin Husain,
Aged about 47 years, Occ. Govt. Service,
R/o. Itwari, Khapripura, Nagpur (On R.A.)

**...APPELLANT
PETITIONER**

// VERSUS //

1. Harshvardhan S/o Shivajirao Dhanvatey
Aged about 43 years, Occ. Business,
R/o. Shivnery, Ramdaspath, Nagpur,
2. Smt. Bhagyashree W/o Shivajirao Dhanvatey,
Aged Major, R/o. Shivnery, Ramdaspath,
Nagpur (dead) thr. legal representatives:-
 - (2-a) Yashowardhan S/o Shivaji Dhanvatey,
Aged about 50 years, Occ. Business,
 - (2-b) Shriwardhan S/o Shivaji Dhanvatey,
Aged – Major, Occ. Business,
 - (2-c) Uma D/o Shivaji Dhanvatey,
Aged about 44 years, Occ. Occ. Nil,

All R/o. Shivneri, Ramdaspath, Nagpur.
**(amendment carried out as per Court's
order dated 30.09.2019)**

3. The Manager,
National Insurance Company,
Reginal Office, 1248-A, Shivaji Nagar,
Dekkan, Jimkhana, Pune
(Ori. Respondents on R. A.)

.... RESPONDENTS

Shri P. N. Kothari, Advocate for appellant.

Ms. R. Bajaj, Advocate with Shri Hande, Advocate for respondent Nos. 1 and 2-a,

Shri M. Shukul, Advocate with Shri R. Bhandarkar, Advocate for respondent No. 2-b.

Shri V. M. Morande, Advocate for respondent Nos. 2-c.

Shri C. A. Anthony, Advocate for respondent No. 3.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 11.02.2021

JUDGMENT

Heard.

2. The appellant herein has challenged the judgment and award dated 31.08.2007 in claim petition No. 116/2000. By the impugned judgment and award, the Claims Tribunal, Nagpur has partly allowed the application under Section 166 of the Motor Vehicles Act, 1988 (for short 'M. V. Act') and awarded compensation of Rs. 1,17,437/- with interest @ 7.5% per annum from the date of the petition till its realization.

3. On 2.9.1997, while the appellant was proceeding towards his residence on his Scooter from Pagalkhana Road to Bairamji Town, the offending vehicle Armada Jeep bearing registration No. MH-31/H-2968 dashed against his scooter. As a result of the said accident, the appellant sustained serious injuries resulting in permanent disablement. The appellant claimed that accident was caused due to rash and negligent driving of the

driver of the offending vehicle .

4. The appellant is a government servant drawing monthly salary of Rs. 3837/-. The appellant claimed that he was initially admitted in Indira Gandhi Medical College and Hospital, Nagpur and in Chaudhary Hospital, Nagpur. He claimed that he had incurred medical expenses and other miscellaneous expenses towards conveyance, attendance, medicines, nutrition etc. The appellant further claimed that he was unable to resume his duties for about 27 months and that he had to refuse promotion as he was unable to work on the promotional post on account of the injuries sustained in the accident. The appellant thus claimed total compensation of Rs. 7,38,599/-, towards pecuniary and non-pecuniary loss.

5. The respondent Nos. 1 and 2 denied that the accident was caused due to rash and negligent driving of the driver of the offending vehicle. They claimed that the appellant is not entitled for such exorbitant compensation. The respondent No. 3, Insurance Company also took a similar defence and claimed that the compensation claimed was exorbitant. The Insurance Company also raised a defence of non-joinder of necessary parties i.e the owner and insured of Scooter bearing registration No. MH-31/A-1254.

6. The Tribunal, upon considering the evidence adduced by the appellant held that the accident was caused due to rash and negligent driving

of the driver of the offending vehicle, and rejected the contention of the Insurance Company that it was a case of contributory negligence. As regards the quantum of compensation, the Tribunal held that the appellant had sustained grievous injuries. The Tribunal however discarded disability certificate at Exh. 86 and held that the appellant had failed to prove that he had sustained permanent disablement. The Tribunal discarded physiotherapy bills at Exh. 52 to 59. The Tribunal further held that the appellant continues to work in the same department and that his salary has almost doubled since the date of the accident. The Tribunal therefore declined to grant any compensation towards future loss of income.

7. The Tribunal referred to Schedule II of Section 163-A of the M. V. Act and awarded compensation of Rs. 5000/- each towards grievous injury, conveyance and nutritional. The tribunal also awarded compensation of Rs.20,437/- towards medical expenses and Rs. 30,000/- towards mental shock and agony. Thus, the Tribunal awarded total compensation of Rs. 1,17,437/-. Being aggrieved by the quantum of compensation awarded by the Tribunal, the appellant has preferred this appeal under Section 173 of the M. V. Act.

8. It may be mentioned that the appellant has filed an application under Order XLI Rule 27 of the Civil Procedure Code seeking leave to produce copy of service book for the period of 1.06.2003 till 1.11.2008, copy of joining letter dated 23.02.1998, copies of letter issued by the Deputy

Director dated 02.08.2004, 05.04.2005, 18.07.2005, 31.10.2019, copies of letter issued by the appellant to Deputy Director, Health Services dated 02.11.2019 and 06.11.2019. These documents are relevant to decide the issue and are required to pronounce the judgment. Hence, the appellant is permitted to produce the documents. The genuineness of the documents at Sr. No. 1, 3 to 8 is not disputed. Hence, the same are taken on record and marked Exh. X.

9. Learned counsel for the appellant states that the medical certificate at Exh. 48 and 49 proves that the appellant had sustained grievous injuries to spinal cord. Learned counsel for the appellant contends that the Tribunal has erred in discarding the disability certificate as well as well as the evidence of PW5 Dr. Alok who stands in position of an expert witness. He has relied upon the decision in ***Routhu Likitha Vs. L. Srinivasa Rao and anr*, 2015(6) ALL MR (JOURNAL) 94.**

10. Learned counsel for the appellant further submits that though the appellant had claimed actual loss of income for a period of 27 months, the letter dated 23.02.1998 indicates that the appellant had joined his services after a period of six months. Learned counsel for the appellant claims that appellant is therefore, entitled for actual loss of income for a period of six months. Learned counsel for the appellant further contends that the Tribunal has erred in discarding bills at Exh. 52 to 59, issued by Dr. Manohar Nigam who has expired. He further submits that in an application

under Section 166 of the M. V. Act, the Tribunal could not have made applicable principle under Schedule II. Reliance is placed on the decision of the Single Judge of this Court in *Bajaj Allianz General Insurance Company Ltd. Aurangabad Vs. Bhimrao S/o Vithalrao Kotgire and others, 2019(3) Mh.L.J. 344* and the decision of *Hon'ble Allahabad High Court in Oriental Insurance Company Limited Vs. Surendra Umrao and another, 2007(3) Civil LJ 470*.

11. Learned counsel for the appellant submits that the letters produced by the appellant along with application under Order XLI Rule 27 of the Civil Procedure Code proves that the appellant had refused promotional post, since he was unable to travel to the place of his new posting. Learned counsel for the appellant further submits that the Tribunal has erred in not granting any compensation towards loss of future prospects and loss of amenities of life. He submits that the compensation awarded by the Tribunal is not just and proper and hence the compensation needs to be enhanced and award needs to be modified.

12. Learned counsel for the respondent Insurance Co. submits that appellant had resumed duties immediately after the accident and this is evident from the evidence of PW-4, Vijay. He further states that the Tribunal was justified in rejecting the disability certificate which was issued in the year 2005, i.e. about 7 years after the date of the accident. Moreover, the Doctor who had issued the disability certificate had not treated the appellant.

The said disability certificate was issued for the purpose of availing traveling concession and not for medico-legal purpose. Learned counsel for the respondent – Insurance Company submits that the appellant had continued to be in service, and he was capable of discharging his duties without any difficulty which is evident from the fact that he was promoted to the post of assistant Superintendent. It is urged that having voluntarily refused the promotional post, the appellant cannot claim any compensation towards loss of future prospects. Learned counsel for the appellant states that the Tribunal has awarded just compensation on the basis of evidence adduced by the appellant.

13. I have perused the records and considered the submissions advanced by learned counsel for the respective parties. The factum of accident is not in dispute. The fact that the appellant had sustained grievous injuries in the said accident and that the accident was caused due to rash and negligent driving of the driver of the offending vehicle is also not in dispute. The only question for consideration is whether the compensation awarded by the Tribunal is ‘just compensation’.

14. At the outset, it may be mentioned that the Claimant had filed application under Section 166 of the M. V. Act for compensation for personal injuries. The Tribunal has allowed compensation under certain heads as per the Second Schedule of Section 163-A of the M. V. Act. Section 163-A is a special provision which provides for payment of compensation on structural

formula basis, provided the annual income of the victim is below Rs. 40,000/- whereas compensation under Section 166 of the M. V. Act depends upon the nature as to injuries, suffering etc. and actual expenses. Both claims are independent and the remedies under Sections 166 and 163 of the M. V. Act are distinct. In the instant case, the appellant having chosen to file the application under Section 166 of the M. V. Act, the Tribunal could not have determined the quantum of compensation on the basis of structural formula prescribed under Second Schedule of Section 163-A of the M. V. Act.

15. The claim is for personal injuries. The law as regards grant of compensation in injury cases is well settled. In ***Rajkumar Vs. Ajay Kumar, 2011(2) Mh. L.J. 56***, the Apex Court has held,

“5. The heads under which compensation is awarded in personal injury cases are the following :

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 routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life. Assessment of pecuniary damages under item (i) and under item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses - item (iii) depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages - items (iv), (v) and (vi) -- involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decision of this Court and High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)

(a) ...

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10. 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. 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 found 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. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may.”

16. In the instant case, the dispute is over non-payment of compensation under the following heads:-

Pecuniary damages:-

- (1) Expenses relating to physiotherapy.
- (2) Loss of earning during the period of treatment.
- (3) Loss of future earning on account of permanent disability.

Non-pecuniary damages

- (1) Loss of amenities of life.
- (2) Loss of expectation of life.

17. The appellant had deposed that he had sustained head and

spinal injury. He was admitted in Indira Gandhi Medical College and Hospital, Nagpur as an indoor patient from 02.09.1997 till 16.10.1997 and was later under treatment of Dr. Sanjeev Chaudhary at Dr. Chaudhary Hospital from 20.10.1997 till 03.11.1997. He has deposed that he was advised physiotherapy. He has produced discharge Card at Exh. 47, 48 and 49, disability certificate at Exh. 86 and physiotherapy bills at Exh. 52 to 59. The petitioner has also examined PW-5 Dr. Alok the Lecturer in Orthopedic in Indira Gandhi Medical College, Nagpur. This witness had examined the claimant and issued the disability certificate at Exh. 86 certifying that the claimant has suffered permanent disablement of 60%. The claimant has examined PW-2 Prithice Manohar Nikam son of Manohar Nikam to prove physiotherapy bills at Exh. 52 to 59 for sum of Rs. 1,34,320/-.

18. Relying upon the discharge cards at Exh. 47, 48 and 49, the Tribunal has recorded a finding that the appellant has sustained fractures and spinal injuries. The Tribunal has however discarded the disability certificate at Exh. 86 and has recorded a finding that the appellant had failed to prove that he had suffered permanent disablement. It is pertinent to note that the evidence of PW-5 clearly indicates that he had examined the appellant to assess the permanent disablement. He had issued a certificate at Exh. 86 stating that the appellant has suffered permanent disability of 60%.

He had admitted in his cross-examination that he had examined the patient personally while assessing the permanent disability. Evidence of PW-5 clearly indicates that the injuries mentioned in the disability certificate at Exh. 86 correspond to the injuries referred to a discharge card at Exh. 48. There is no denial of the said statement and as such the said disability certificate cannot be discarded solely on the ground that it was issued about 7 years after the date of the accident.

19. It is also to be noted that the Tribunal has not disbelieved the contents of the said certificate at Exh. 86 but has rejected the same on the ground that it was issued for the purpose of claiming travel concession and not for medico-legal purpose. The Tribunal has also observed that the said certificate is not in required proforma. Rejection of disability certificate on such ground cannot be countenanced when the statute does not mandate such procedure. The Tribunal in my view, has succumbed to needlessly technical view. The evidence of PW-5 reveals that he has been working as a Lecturer in Orthopedic Department in Indira Gandhi Medical College and Hospital, Nagpur since the year 2003. He is orthopedic surgeon, competent to assess the disablement of the claimants or any other patient. The Tribunal has not questioned either the genuineness of the certificate or the competency of PW-5 to issue such certificate. The claimants having examined the author of the certificate and proved the

genuineness of the certificate, the Tribunal was not at all justified in rejecting the same for the reason that it was issued for some other purpose, *moreso*, when the evidence of PW5 amply proves that the disablement correlates to the injuries mentioned in the discharge certificate at Exh. 48.

20. The appellant had deposed that he was advised physiotherapy. He has deposed that he has incurred expenses of Rs. 28,000/- for physiotherapy from the date of accident till the date of filing of the petition. He has produced bills at Exh. 52 to 59 which include expenses incurred after filing of the petition. He had also examined PW-2, Prithice s/o Manohar Nikam. He deposed that his father was physiotherapist and that he expired on 05.06.2006. He identified signature of his father on the bills at Exh. 52 to 59. He denied suggestion that bill at Exh. 52 to 59 do not bear signature of his father.

21. It is pertinent to note that the father of PW-2, who was a physiotherapist, has expired and the hospital has been closed. It was under these circumstances that the appellant was unable to examine the author of the documents to prove the contents. Nevertheless, PW-2 has identified the signature of his father on the bills at Exh. 52 to 59.

He has candidly admitted that he has no personal knowledge of the said bills or the treatment taken by the appellant. It is however to be noted that the discharge certificate at Exh. 45 of the Gandhi Medical College and Hospital, Nagpur shows that the appellant was diagnosed with fracture of C5 vertebra with quadriparesis with bladder bowel involvement. The Medical Certificate at Exh. 52 dated 10.03.1995 also states that the appellant has suffered cervical spine injury with fracture of C5 vertebra with spastic quadriparesis. The Doctor had certified that the appellant was on continuous treatment and as per the advise of orthopedic surgeon needs continuous physiotherapy. Considering the nature of injuries, extent of permanent disablement coupled with medical advise for continuous physiotherapy, the Tribunal was not justified in disbelieving the statement of the appellant that he had taken continuous physiotherapy as advised. Consequently, the Tribunal was not justified in discarding physiotherapy bills at Exh. 52 to 59 for Rs. 1,34,320/-.

22. As regards loss of actual earning, the appellant had deposed that he had not reported for duty for a period of about 27 months. The appellant who is a government servant had not produced any evidence to show that he had not joined duty for a period of 27 months. Subsequent letter produced under Order XLI Rule 27 of the

Civil Procedure Code states that the appellant had resumed duty after a period of six months. This letter falsifies the contention of the appellant that he was unable to resume duties for about 27 months. The letter sought to be produced also does not appear to be genuine as the said letter neither bears the signature of the appellant nor has an endorsement of the department. The letter appears to be a fabricated document and hence cannot be relied upon. Be that as it may, considering the nature of injuries suffered by the appellant and the duration of the treatment undergone, it can be inferred that the appellant was unable to resume duty for a period of four months. Considering the fact that the appellant was drawing salary of Rs. 3837/- per month, the appellant is entitled for compensation of Rs. 15,348/- towards actual loss of income, for four months.

23. As regards loss of future earnings, letter issued by the Deputy Director shows that the appellant was working in the Government Department as a Senior Clerk and that he continues to be in service, even after the accident. Hence, the appellant is not entitled for any compensation towards future loss of income. It is however to be noted that the appellant had to decline promotion as he was not able to travel to the place of new posting. This is evident from the

letters produced along with the application under Order XLI Rule 27 of the Civil Procedure Code. Letter dated 02.08.2004 reveals that the appellant was promoted in the year 2004 as an Assistant Superintendent, Rural hospital, Badrawati, Dist. Chandrapur and that the appellant had expressed his inability to accept the post. Similarly, letter dated 05.04.2005 reveals that by order dated 22.12.2004, the appellant was once again promoted as Assistant Superintendent and posted at Tumsar, Dist. Bhandara. The appellant had challenged the said transfer order on the ground that he was unable to travel to Tumsar, Dist. Bhandara on account of his disability. The order dated 28.12.2004 reveals that the appellant had agreed to make a representation that he was ready to forgo his promotion. In view of this statement, the Maharashtra Administrative Tribunal had directed the Department to maintain status-quo and to not relieve the appellant. In view of said order, the Deputy Director vide letter dated 05.04.2005 had cancelled the said promotional order and as a consequence thereof, the appellant had continued to work as Senior Clerk in Mental Hospital, Nagpur.

24. The evidence on record thus indicates that the appellant

had refused two promotions in view of his inability to travel to Chandrapur and Tumsar, Dist. Bhandara due to the injuries sustained in the accident. Since November 2007, the appellant has been promoted and posted at Nagpur. The appellant is therefore entitled for monetary loss caused due to his inability to accept promotional post from 2004 till the date of his promotion. The difference in salary drawn by the appellant as Senior Clerk and that of promotional post is stated to be Rs. 800/-. Thus, the claimant is entitled for compensation of Rs. 31,200/- for pecuniary loss caused due to refusal of promotion for 39 months i.e. from August 2004 till November 2007.

25. The appellant is also entitled for compensation of Rs. 60,000/- towards loss of amenities of life and Rs. 60,000/- towards loss of expectation of life. The appellant is therefore, entitled for additional compensation of Rs. 3,00,868/-.

26. Under the circumstances and in view of above discussion, the appeal is partly allowed. The appellant is entitled for additional compensation of Rs. 3,00,868/- with interest @ 7.5% per annum from the date of filing of appeal till the date of realization. Award stands modified accordingly. The respondent – Insurance Company deposit the balance amount within a period of eight weeks before the Claims

Tribunal, Nagpur. The appellant shall be entitled to withdraw the said amount along with accrued interest.

(SMT. ANUJA PRABHUDESSAI, J.)

Gohane.