IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

FIRST APPEAL NO. 1270/2019

Vaibhav s/o Prakash Vinkare,
aged about 22 years, Occ. Nil,
r/o c/o Anil Namdeo Vinkare,
c/o Ravindra Ramdas Varme,
Rajani Park, Pimpalgaon, Tq. Dist.
Yavatmal. .....**APPELLANT**

...V E R S U S...

1. Satish Vitthalrao Kadam,
Aged about 30 years, Occ. Driver,
r/o Rani Laxmibai Ward, Umarkhed,
Tq. Umarkhed, Dist. Yavatmal.

2. Jitesh Shankarrao Shahane,
Occ. Owner of vehicle, r/o Savadas
Colony, Hanuman Ward, Umarkehd,
Dist. Yavatmal.

3. HDFC ERGO General Insurance Co.
Ltd. Branch at 1st Floor, Renuka Complex,
Nirala Bazar, Nageshwar Wadi, Aurangabad
(M.S.), through Legal Manager, B. Wing,
5th Floor, Shriram Towers, Next to NIT,
Kingsway, Sadar, Nagpur – 440 001. ...**RESPONDENTS**

Mr. Vivek Awchat, Advocate for appellant.
Mr. H. N. Verma, Advocate for respondent no.3.

CORAM:- V. M. DESHPANDE, J.
DATED :- 21.10.2021.

ORAL JUDGMENT

1. On this appeal, on 24.06.2019 notice for final disposal was issued and record and proceedings were called. Accordingly, record and proceedings are made available for the perusal of this Court.

Respondent nos. 1 and 2, though served, nobody has put in appearance on their behalf. Appellant is represented by Mr.Awchat, Advocate. Respondent no.3 is represented by Mr. Verma, Advocate. Heard learned counsel for the parties. **Admit**. Taken up for final hearing.

2. This appeal is filed by appellant under Section 173 of the Motor Vehicles Act. Appellant, being aggrieved by judgment and award dated 14.06.2018, passed by learned Chairman, Motor Accident Claim Petition No.10/2016, who partly allowed the claim petition filed on behalf of the appellant. The present appeal, therefore, is filed for enhancement of the compensation.

3. Appellant got injured in a vehicular accident on 01.08.2014 when he was proceeding to Umarkhed from Pusad on his motorcycle having registration No.MH-29/AG-1647. There is no dispute that the offending vehicle is Maruti Swift car bearing No.MH-29/AD-0941. At the relevant time, respondent no.1-Satish Kadam was driver and respondent no.2-Jitesh Shahane was owner of the said vehicle. According to the appellant, the offending vehicle was in breath-neck speed and was driven recklessly and negligently, resulting into the incident causing grievous fracture injury on his

right leg. Initially, the appellant was taken to Government Medical College, Nanded and from there he was shifted to KEM Hospital, Mumbai where he was an admitted from 11.08.2014 to 03.10.2014, 02.12.2014 to 12.12.2014 and 14.05.2015 to 16.05.2015. An offence was also registered against the driver of the offending vehicle bearing Crime No.215/2014 for an offence punishable under Sections 279 and 337 of the IPC at Police Station, Umarkhed. The age of the appellant was 19 years at the relevant time. The appellant filed claim petition. Even before the Tribunal, the driver did not appear and the owner of the vehicle though put in appearance did not file written statement. Hence, the matter proceeded ex parte.

4. The insurance company-respondent no.3 contested the petition. According to the insurance company, there was a contributory negligence on the part of the appellant. It was also the claim of the insurance company that the appellant was not holding valid driving license for motorcycle. There is no dispute that offending vehicle was partly injured at the time of accident with respondent no.3. The learned Chairman of the Tribunal framed the issues. The appellant entered into the witness box and he also examined Dr. Rangrao Ade, Medical Practitioner as his witness. The insurance company chose not to adduce any oral evidence. After

appreciating the evidence, the chairman of the Tribunal found that the appellant has successfully proved that he sustained injuries in an accident that took place on 01.08.2014 due to dash given to him by Maruti Suzuki car having registration No. MH-29/AD-941. The tribunal disallowed the claim of insurance company that the appellant was also negligent in the accident. The learned Judge also found that at the relevant time, the appellant was holding valid driving license. The learned Judge, after considering the evidence, has granted Rs.1,59,120/- along with interest at the rate of 9% only from the date of the petition till its realization from the original non applicant nos. 1 to 3.

5. Though the case of the insurance company in respect of the contributory negligence and in respect of holding the valid license by the appellant was rejected, respondent no.3-insurance company chose not to file appeal challenging the said finding nor in this appeal any cross-appeal is filed by the insurance company. Not only that, during the hearing of this appeal today, the learned counsel for the insurance company did not press or did not argue all these aspects. Resultantly, it is clear that the appellant was not negligent and at the relevant time, he was holding valid driving license and due to rash and negligent driving of the respondent no.1, he suffered injuries.

Even the nature of the injury is also not disputed by the insurance company.

6. According to the claimant, he was working as helper with mason. He used to get Rs.250/- per day i.e. Rs.7500/- per month. Looking to the age of the appellant, he was 19 years only and in my view, the learned Chairman of the Tribunal has rightly pressed into service the multiplier of 18. It is to be noted here that learned Chairman of the Tribunal has rejected the claim of the appellant that he was earning Rs.250/- per day on the ground that he did not produce any documentary evidence for the same. This aspect of the matter is very seriously assailed by the learned counsel for the appellant.

7. The appellant has pleaded in this petition that he was working as a helper with mason and he used to get Rs.250/- per day. In the examination in chief also, he stated like that. This particular claim of the appellant, it appears that, was not very seriously challenged by the insurance company when the appellant was cross-examined. In my view, the learned Judge has committed error in rejecting the claim for absence of any documentary evidence. It is really hard to have any documentary evidence for helper of a mason

to get any documentary evidence that he was earning Rs.250/- per day. The claim of the appellant that he was working as helper with mason is not at all challenged by the insurance company if the cross-examination of the appellant is produced. If that be so, in my view, the appellant has not made any exaggerated claim of his daily wages prevailing in the year 2014. Therefore, I hold that at the relevant time, the appellant was getting Rs.250/- per day as his wages. If that be so, he shall be earning Rs.7500/- per month because there is nothing on record that there was no reason for him not to get daily employment. Once, the earning of appellant is fixed at the rate of Rs.7500/- per month, the appellant shall be getting Rs.90,000/- per year. As the learned Chairman has rightly applied multiplier of 18, he will be getting Rs.16,20,000/-.

8. Learned counsel for appellant has also challenged the finding recorded by learned tribunal that the tribunal has assessed the disability only to 8% and not 50% as stated in Exh.-59, which is proved by Dr. Rangrao (AW2), evidence of Dr. Ade would show as under:

> "According to me, percentage of permanent disability of the appellant was found <u>50% to the extent of affected part only</u>." (emphasis supplied).

After that Dr. Ade stated as under:

"The said percentage in respect of his entire body was 8%"

Thus, even according to the witness of the appellant, disability in respect of his entire body is 8%. Therefore, it is clear that functioning of the appellant was not greatly affected. Therefore, in my view, the claim made by the appellant before me that the Court has committed mistake in accepting the disability only to the extent of 8% is incorrect, has to be rejected.

9. Resultantly, appellant will be entitled to Rs.1,29,600/- i.e. 8% of Rs.16,20,000/- plus Rs.75,000/- by way of medical expenses as granted by trial Court and Rs.15,000/- on account of pain and sufferings and loss of normal life. Thus, in totality, the appellant will be entitled to receive Rs.2,19,600/-. Out of that, the appellant has already been granted Rs.1,59,900/-. Therefore, the appellant is entitled to remaining amount of Rs.60,480/- together with interest at the rate of 9% per annum from the date of petition till its realization. It is made clear that in this appeal, the appellant did not challenge the quantum in respect of medical expenses and other incidental charges and pains and sufferings and loss of enjoyment of normal life. Hence, the following order is passed.

ORDER

(i) The appeal is partly allowed.

(ii) Clause (2) of operative part of the impugned order is substituted as under:

> "Non applicant nos. 1 to 3 shall jointly and severally pay the amount of Rs.2,19,600/- (inclusive of payment of compensation under Section 140 of the Motor Vehicles Act) to the applicant towards compensation along with interest at the rate of 9% per annum from the date of petition till its realization."

(iii) The insurance company shall deposit difference amount before the Tribunal within a period of four weeks from today.

Decree be drawn up accordingly.

JUDGE

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