

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

FIRST APPEAL NO.314 OF 2009

Achyut s/o Motiramji Solanake,
Aged about 58 years, Occ.: Driver (MSRTC).,
R/o. Near Police Station, Chandur Railway,
Tah. Chandur Railway, Distt. Amravati.

APPELLANT

// VERSUS //

1. Mahadeo s/o Janardhan Kolhe,
Aged major, Occ.: Driver,
(Vehicle No. MH-27-D-511),
Tata Sumo, R/o. Chandur Railway
(Khdakpura), Tah. Chandur Railway,
Distt. Amravati.
2. Badridas s/o Ramchandra Tawri,
Aged major, Occ.: Driver,
(Vehicle No. MH-27-D-511),
Tata Sumo, R/o. Ghuikhed,
Tah. Chandur Railway,
Distt. Amravati.
3. The Oriental Insurance Co.
Divisional Manager, Division Office,
Rajapeth, Amravati.

RESPONDENTS

Shri. S. S. Shingane, Advocate with Shri. Uttam Chakravarti,
Advocate for appellant.

Mrs. Mrunal Naik, Advocate for respondent No.3.

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON 03/01/2023
PRONOUNCED ON 10/02/2023

JUDGMENT

1. By preferring this appeal, appellant who is original claimant claiming enhancement of the compensation which is awarded by the Motor Accident Claims Tribunal, Amravati in M.A.C.P No.169 of 2000 decided on 30.01.2008.

2. Facts leading to file this appeal may be stated briefly as under:

On 21.02.2000, appellant was travelling on Scooter as a pillion rider, one Gupta was riding the Scooter and one another person was sitting in the middle. They were proceeding by Amravati Road towards market. At the relevant time, one TATA Sumo bearing No. MH-27-D-511 came from the Amravati side and was proceedings to Chandurbazar was driven by its driver in excessive speed, in rash and negligent manner without observing the traffic rules and dashed against the Scooter. Due to the said dash, appellant sustained grievous injuries like fracture injuries. Due to the said accidental injuries, he had sustained 40% of permanent disablement. As per the contention of the appellant, said accident took place due to the rash and negligent driving of TATA Sumo driver which is owned by opponent No.2 and validly insured with the opponent No.3 vide policy No.1218831. As the said accident took place due to the rash and negligent driving of TATA Sumo driver which is owned by the opponent No.2 and validly insured with

opponent No.3, therefore opponent Nos.1 to 3 are jointly and severely liable to pay compensation.

3. It is further contention of the appellant that at the time of accident, appellant was serving as a driver in Maharashtra State Road Transport Corporation, Chandur Railway and was drawing salary. Due to the accidental injuries, he could not attend the work for 289 days out of the same he was paid for 106 days. He has sustained the loss of income of 183 days. He has also sustained the functional disability, therefore he is entitled to claim the compensation on various grounds. He claimed the compensation by bifurcating the same as follows:

Rs.40,000/- towards medical expenses, transportation, special diet and others, Rs.4,00,000/- towards the loss of future income, Rs.4,00,000/- towards future prospect which he had lost. Rs.50,000/- towards pain and suffering, Rs.50,000/- towards mental agony of the family and Rs.50,000/- towards the loss of income. Thus, he has claimed total compensation of Rs.9,90,000/-.

4. In response to the notice, respondent Nos.1 and 2 failed to appear before the Tribunal. Respondent No.3 - Insurance Company filed written statement and raised the defence that said accident took place due to the negligence of the Scooter rider. The Scooter was driven by its

driver and owner by contravening the traffic rules and regulations. Three persons were travelling on the said Scooter at the time of accident, hence Insurance Company is not liable to pay compensation. The defence of the Insurance Company is also that the appellant is still in service, thus he has not sustained loss towards the future prospect and the future income, therefore he is not entitled for compensation under the said heads.

5. After considering the rival submissions of the parties, the Tribunal awarded the compensation of Rs.75,000/- including the NFL amount.

6. Being aggrieved and dissatisfied with the judgment of the Motor Accident Claims Tribunal the appellant claimed the enhancement of the compensation on the ground that learned trial Court had not considered that appellant has sustained functional disability. The Tribunal had also not considered that appellant has not received salary of 183 days and sustained the loss as well as the Tribunal had not considered the loss of future prospect of the appellant, and therefore appellant is entitled for enhancement of the compensation.

7. Heard learned Advocate Shri S. S. Shingne with Shri Uttam Chakravarti, learned Advocate for the appellant. He reiterated the same

contentions and submitted that the Tribunal had not considered that appellant had sustained functional disability. He had also sustained the disability to the extent of 40% to 50%. The loss of income was not awarded by the Tribunal and for above all these reasons appellant is entitled for enhancement of the compensation.

8. On the other hand, Ms. Mrunal Naik, learned Advocate for respondent No.3 – Insurance Company submitted that functional disability is not proved by the appellant. Appellant is in service. As per the medical evidence, appellant has sustained 15 % disability but there is no functional disability, as the working capacity of the appellant is not affected. Thus, appeal has no merit and liable to be dismissed.

9. Considering the submissions made before me, this appeal is already admitted and put the parties on notice that the appeal would be heard finally. After hearing both the sides, following points arise for my determination, which are as under:-

- (i) Whether the Tribunal has committed serious error in awarding the inadequate compensation?
- (ii) Whether the order passed by the Tribunal calls for any interference?
- (iii) What order?

10. The learned Advocate for the appellant has submitted that the disability certificate produced on record and the evidence of Medical Officer which is adduced by the appellant to substantiate his claim shows that appellant had sustained 20% permanent disability. The disability was in right lower limb. Board has issued the certificate that appellant has sustained permanent disability. Said certificate is at Exh.59. Appellant has also adduced the evidence of Dr. Govind Balaprasad Lahoti who testified that appellant was admitted in his hospital from 24.04.2000 to 19.05.2000. Again, admitted on 17.11.2000. Appellant had sustained fracture of neck femur with non union fracture tibia fibula of right side. He had undergone surgery for fixation of neck femur and also for fracture of tibia. The appellant has sustained 15% of disability. Due to the said disability the appellant is unable to drive heavy vehicle for long duration. He had also proved the bill of Rs.15,000/- which was incurred by the appellant towards the medical treatment. He further submitted that disability certificate Exh.59 shows that there is permanent disability of lower limbs. He further submitted that the evidence of appellant is also recorded and he also testified that he was admitted in the hospital and sustained the permanent disability. However, the Tribunal had not considered the same. The learned Member of the Tribunal should have determined the compensation on the basis of 20% disability and loss of earning capacity.

11. The learned counsel for the respondent No.3 Ms. Mrunal Naik submitted that the evidence of Medical Officer nowhere shows that earning capacity of the appellant is reduced and it result into the loss of earning capacity. On the contrary, cross-examination of the appellant shows that he is still in service and working as a driver. Appellant has admitted during his cross-examination that he is still in service and S.T. Corporation has not debarred him from getting any increment. Thus, this cross-examination itself is sufficient to show that there was no functional disability. Learned Member of the Tribunal had considered the said evidence and rightly determined the amount of compensation.

12. It is seen from the evidence available on record that there is substance in the argument so advanced on behalf of respondent No.3 and no merit in the argument of learned counsel for the appellant as regards the calculations of loss of earning capacity made by the Tribunal. The law regarding how to assess the disability is settled by the judgment of the Hon'ble Apex Court in **Raj Kumar Vs. Ajay Kumar and another reported in 2011 ACJ 1** wherein Hon'ble Apex Court held that disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation. It

is further held by the Hon'ble Apex Court that where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Permanent disability would result in corresponding loss of earning capacity. In para 9 of the said judgment it is further held by the Hon'ble Apex Court that therefore the Tribunal has to first decide whether there is any permanent disability and if so, the extent of such permanent disability. This means that Tribunal should consider and decide with reference to the evidence: (i) Whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement; (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future

earning capacity. But if the Tribunal concludes that there is a permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Thus, the ascertainment of the permanent disability on the actual earning capacity involves three steps. First is that it has to be ascertain that what activities the claimant could carry on in spite of the permanent disability, secondly to ascertain his avocation, profession and nature of work before the accident and third to find out whether the claimant is totally disabled from earning any kind of livelihood or 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 whether he was prevented or restricted from discharging his previous activities and functions.

14. In the present case, the admission given by the appellant during the cross-examination as well as the chief-examination shows that he is still in service and working as a driver. He specifically admitted that he is not debarred by the State Road Transport Corporation from getting any increment. These admissions are sufficient to show that the

appellant has not lost his earning capacity, but he is working as he used to work previously on the same post.

15. It is well settled law that, in order to determine the extent of loss of earning capacity, what is more important is the functional disability arising from the permanent disability. Functional disability which is the disability to earn, need not be same as permanent disability. A person may have 100% permanent disability and yet it may not result in complete loss of earning capacity. Thus, the claimant is required to prove not only extent of his permanent disability but also extent of functional disability, so that proper assessment of earning capacity is lost by the claimant on account of injuries suffered in the accident can be ascertained.

16. In the instant case, the appellant who is serving as a driver in Maharashtra State Road Transport Corporation (M.S.R.T.C.) is continued with the same job after the accident. Suffice to state that, he is continued in service as his earning capacity is not lost and it remains as it is and he is able to do the said work. Thus, the appellant failed to prove that due to the accidental injuries, he sustained functional disability, and therefore sustained loss towards the future income and future prospect. Therefore, the contention of the appellant that Tribunal

had not considered that his functional disability is not sustainable. The learned Advocate for the appellant place reliance on **Hareshwar Harischandra Mistry vs. Pravin B. Nayak and another reported in 2022 SCC OnLine Bombay 14**. However, the facts of the cited case and present case are not identical. Hence, not helpful to the appellant.

17. As regards the second submission of the appellant is concerned, that he has not received the salary for 183 days and thus there is a loss of income. Admittedly, appellant was on leave for 289 days. Appellant has adduced the evidence of Mohan Madhukar Agwan as witness No.4 vide Exh.66, who is serving as an Accountant in S. T. Department. As per his evidence, the petitioner was on medical leave from 21.2.2000 to 31.3.2001. Salary for 106 days was given to him while for the remaining period he was not paid salary. Though, this witness is cross-examined at length by the Insurance Company, nothing incriminating is brought on record. This evidence shows that out of 289 days, he was paid for 106 days and he sustained loss of income by not getting salary of 183 days. Though, Insurance Company had adduced the evidence of Pandurang Santoshrao Shende, however has not proved that there was no loss of income to the appellant.

18. The evidence of Witness No.4 Mohan Madhukar Agwan sufficiently shows that he was paid only for 106 days. Thus, it is clear that appellant sustained the loss of income of 183 days. As per the evidence i.e. documentary evidence produced on record, the appellant was drawing the salary of Rs.6,581/- after deducting the statutory deductions and he was not paid for 183 days. Thus, appellant is entitled to receive the salary of 183 days for which he was not paid. The basic salary of the appellant is Rs.4,610/- and by including H.R.A. and medical Bhatta it comes to Rs.6,581/- as per Exh.67. This certificate is not challenged by the Insurance Company regarding the salary of the appellant. The said 183 days approximately is six months. Thus, appellant has not received the salary of six months i.e. Rs.6,581/- X 6 it comes to Rs.39,486/-. Therefore, in my view, in addition to the compensation amount paid by the Tribunal appellant is entitled to receive Rs.39,486/- towards loss of income. Appellant is also entitled to receive additional amount on account of accident as appellant undergone mental agony, pain and suffering and same should be Rs.25,000/- in lump sum.

19. The appeal therefore deserves to be allowed partly with proportionate cost. Hence, point Nos.1 and 2 answered accordingly.

20. The appeal is partly allowed with proportionate costs.

21. In addition to the compensation granted by Motor Accident Claims Tribunal, Amravati, respondent No.3 shall also pay further amount of compensation Rs.39,486/- towards loss of income and Rs.25,000/- towards mental agony, pain and sufferings. Thus, total amount of Rs.39,486/- + Rs.25,000/- it comes to Rs.64,486/-. Thus, appellant is entitled to receive amount of compensation Rs.64,486/- along with interest @ of 7.5% per annum. Hence, I proceed to pass the following order.

ORDER

- (i) Appeal is partly allowed.
- (ii) In addition to the compensation granted by Motor Vehicle Accident Claims Tribunal, Amravati, respondent No.3 shall also pay further amount of Rs.64,486/- (Rs. Sixty Four Thousand Four Hundred Eighty Six) to the appellant together with interest @ Rs.7.5 % from the date of petition till final payment.
- (iii) Decree be drawn accordingly.

(URMILA JOSHI-PHALKE, J.)

Sarkate.