

N THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**FIRST APPEAL NO.111 OF 2017
WITH
CIVIL APPLICATION NO.2815 OF 2017
IN
FIRST APPEAL NO.111 OF 2017**

RAOSAHEB SAKHARAM SHINDE)
Age – 54 years, Occupation – Service)
Residing at : Manikdoh Colony, Khamgaon)
Taluka – Junnar, District – Pune.)...APPELLANT

V/s.

- 1. GOURAV GOVIND MUNDADA**)
Residing at Gangadham Bunglow)
Phase No.1, Bunglow No.46,)
Market Yard, Pune.)
)
- 2. ICICI LOMBAR HOUSE**)
414, P Balu Marg, Off Veer Sawarkar Marg)
Near Siddhivinayak Temple, Prabhadevi)
Mumbai 400 025.)...RESPONDENTS

Mr.D.J.Dalal, Advocate for the Appellant / Applicant.

Mr.Rajesh Kanojia a/w. Ms.Nikita Singh i/by, Res Juris, Advocate for the
Respondent No.2.

CORAM : ABHAY AHUJA, J.

RESERVED ON : 18th JULY, 2023
PRONOUNCED ON : 10th JANUARY, 2024

JUDGMENT :

1. This is an Appeal filed under Section 173 of the Motor Vehicles Act, 1988, (the “M. V. Act”) by the injured Appellant in Motor Accident Claim Petition No.87 of 2010 filed before the Motor Accident Claims Tribunal, Pune, seeking compensation denied by the Tribunal.

2. The background facts are that on 18th June 2009, at 4.30 p.m., the Appellant and his friend Ganesh Dhantrao were proceeding towards Pune on motorcycle bearing Registration No.MH-14-S-2111 at Bota Shivar on Pune Nashik Road driven by the Appellant, when one Santro car bearing Registration No.MH-12-DE-371 came from opposite direction and dashed the motorcycle of the Appellant. The Appellant and his friend sustained injuries and the Appellant was admitted initially in Om Chaitanya Hospital and later shifted to Ruby Hall Clinic, at Pune.

3. It is the case of the Appellant that at the time of the accident, the Appellant was 46 years and serving in the Irrigation Department of the Government drawing a salary of Rs.11,865/- per month. That, the injuries sustained by the Appellant in the accident decreased the ability of the Appellant to work in the manner he used to work earlier thereby

affecting the earning capacity of the Applicant. The Applicant preferred a Claim Application under Section 166 of the M. V. Act for an amount of Rs.5,00,000/- as compensation under various heads.

4. The Respondent no.1, owner of the Santro car, opposed the Claim Application and filed a written statement denying that he was driving his Santro car in rash and negligent manner as alleged in the Application and that Appellant suffered permanent disability and was unable to work as earlier. It is stated by Respondent No.1 that one other person, who was not having driving license, was driving the motorcycle and that the Appellant falsely stated that he was driving the motorcycle and therefore the Appellant is not entitled for compensation as claimed under various heads. The age and income of the Appellant was denied. That the claim was not maintainable for non-joinder of necessary party as the Appellant had not joined the Insurance Company which had insured the motorcycle and thus for all above reasons the Respondent No.1 prayed for dismissal of the Claim Application. Without prejudice, the Respondent No.1 submitted that the Santro car was insured with the Respondent No.2 Insurance company at the time of the accident.

5. The Respondent no.2, the Insurance company of Santro car, also filed its written statement admitting that the alleged car involved in the accident was insured with it. However, Respondent No.2 denied that any accident took place as claimed by the Appellant. The Respondent no.2 also denied that the driver of the car, so also the Appellant, had driving license to drive their respective vehicles, stating that it amounted to breach of the terms and conditions of the Insurance policy. The age, income and permanent disability of the Appellant was also denied. It was, accordingly, prayed that the Application be dismissed.

6. The Tribunal, after going through the police papers, the evidence as well as the testimony of the witnesses, held that it was partly proved that the accident took place due to the rash and negligent driving of the driver of the owner of the Santro car bearing registration no. MH-12-DE-371 at Bota Shivar on Pune Nashik road. The Tribunal also held that the Appellant admitted that he was not holding driving license and and thus he contributed to the accident by driving the motorcycle in the middle of the road without driving license. The Tribunal therefore held that the Appellant's contributory negligence was to the extent of 25%. That, the Appellant did not prove his permanent disability certificate by examining either the treating doctor or Medical Officer

who issued the certificate. It was recorded that the doctor who issued certificate stated in his evidence that the Appellant had visited him for post operative treatment and he was not the doctor who had treated the Appellant. On the issue of compensation, the Tribunal held that the Appellant had not proved that the injuries suffered by the Appellant in the said accident resulted in permanent disability affecting his future income and that the Appellant was still in government service and his salary was also increased from Rs.12,365/- to Rs.20,000/- per month and there was nothing on record that promotion was denied to him due to the injuries sustained by the Appellant. Therefore, there was no loss of future earning and the Tribunal held that the Appellant was not entitled for compensation under the head "future loss of earning." On the issue of compensation under other heads like hospital, medicine charges, pain and sufferings, transportation charge, leave encashment and future medical treatment charges, the Tribunal held that (i) the Appellant had not filed original bills of hospitalization and discharge card as they were lost for which he lodged report of missing of those documents in 2014. However, the certificate from police regarding lodging of report is dated 2nd April 2014 whereas the case is filed in the year 2009 which showed that the reason for non-filing of original bills did not appear to be correct and the same was an afterthought; (ii) that

it was not proved that the Appellant was admitted in Ruby Hospital at Pune for treatment of injuries sustained by him in the road traffic accident on 18th June, 2009 by Santro car of Respondent No.1 and therefore the Respondents No.1 and 2 were not liable to pay the hospital bill of Ruby Hospital incurred by the Appellant; (iii) that the Appellant had filed xerox copies of discharge card, bills of medicine, hospital but those were not shown to the witness to prove them by secondary evidence and hence the same could not be relied upon; (iv) that the Appellant was not entitled to hospital/medicine charges, leave encashment, future expenses, pain and sufferings, conveyance allowance and special diet allowance, loss of earnings in future etc., since basic requirements for grant of above compensation were not proved by the Appellant.

7. On the issue of breach of insurance policy, the Tribunal held that the burden to prove breach of policy was on the Respondent no.2 but since neither the Appellant nor the Respondents No.1 and 2 filed the copy of the driving license of the driver of the Santro car and the Appellant did not join the driver of the Santro car as party to this proceeding though he was proper party (though not necessary party), as per settled law, his contributory negligence could not be decided.

The Tribunal further held that since the Respondent No.1 did not file the driving license of the driver of the Santro car despite being directed to do so, adverse inference was drawn against the Respondent No.1 and hence Respondent No.2 Insurance company had proved that there was a breach of the terms and conditions of the insurance policy by Respondent No.1. Therefore, in the event that the Claim Application would be allowed, then the Respondent No.1 only would be liable to pay compensation and not Respondent No.2 Insurance company. The Tribunal thus held that it was not proved that the Appellant suffered permanent disability due to the injuries suffered by him in the accident and also did not prove that he was entitled to compensation. That, the Respondent No.2 Insurance company proved that there was breach of the terms and conditions of the insurance policy by the Respondent No.1, car owner and thereby dismissed the Claim Petition.

8. Aggrieved by the judgment and award, the Appellant has filed this Appeal.

9. The Appellant also submitted a copy of the Judgment and Award in Motor Accident Claim Petition No. 8 of 2011 dated April 26, 2012 passed by the Motor Accident Claims Tribunal, Latur, filed by one Mr.

Ganesh s/o Sambhaji Dantro who was the pillion rider with the Appellant at the time the accident took place. In the said case the Tribunal had held that the claimant had proved that the accident occurred due to the rash and negligent driving of the driver of the Santro car bearing registration No. MH-12-DE-371 viz. the same Santro car as involved in the accident in question in this Appeal and that the claimant had suffered permanent disability due to the said accident. The Tribunal had also held in that case that the Respondent No.2 Insurance company could not prove the alleged breach of the terms and conditions of the insurance policy by Respondent No.1, owner of Santro car. The Tribunal held that the Respondent No.1, owner and the Respondent No.2 Insurance company, were jointly and severally liable to pay the claimant a compensation of Rs.3,68,212/- along with 6% simple interest per annum from the date of the Petition till realization of awarded amount.

10. It is pertinent to note that, the Appellant had filed Civil Application No. 2815 of 2017 for production of the driving license of the Appellant issued on 28th March, 2002 and to accept the same as additional evidence. The Appellant stated that the reason for filing the said Civil Application was that the Tribunal vide paragraph 13 of its

Judgment and Award dated 2nd November, 2016, came to an erroneous conclusion that the Appellant was not holding a driving license and was driving the motorcycle without a license.

11. Mr. D.J. Dalal, learned Counsel for the Appellant, submits that the Tribunal also erred in holding that the Appellant failed to prove permanent disability as there was a clear admission in the cross examination of Dr. Shashikant Thorat that after removal of implants the Appellant would suffer about 15-20% disability and also the medical certificate issued by B.J. Medical and Sassoon General Hospital clearly states that the Appellant has permanent disability of 16%. On this issue, Mr. Dalal has relied on the decision of ***Raj Kumar v. Ajay Kumar and Another***¹. On the issue of the Appellant's driving license, Mr. Dalal submits that in his cross examination, the Appellant stated that he had a valid driving license but the same was not filed in the proceedings before the Tribunal but he has filed Civil Application No. 2815 of 2017 for production of the driving license of the Appellant issued on 28th March, 2002 and to accept the same as additional evidence. Mr. Dalal further submitted without prejudice, that as per the decision of this Court in the case of ***Shubhash Waman Baviskar and others v. Adinath***

¹ (2011) 1 SCC 343.

Hambirrao Budhwant and Another², not holding an effective and valid driving license cannot be a ground to deny compensation. On the issue of compensation, Mr. Dalal referred to the deposition of witness no.4, Smt. Manjusha Somnath Kulkarni, administrator and legal adviser at Ruby Hall Clinic, that the Appellant was in hospital from 19th June, 2009 to 2nd July, 2009 and the total hospitalization bill was Rs.70,398/- which was uncontroverted and uncontested. On the issue of the non-joinder of the driver of the Santro car, Mr. Dalal relies on the decision in the case of ***New India Assurance Company Ltd. v. Sitaram Devidayal Jaiswal and others***³ where it was held that the claimant is under no obligation to add proper and necessary parties.

12. Mr. Rajesh Kanojia, learned Counsel for the Respondents No.1 and 2 relied upon the Judgment and Award of the Tribunal and reiterated that the Appellant did not hold a valid driving license. Mr. Kanojia also submitted that the permanent disability was not proved as the doctor who issued the disability certificate was not the treating doctor and also that the Appellant did not submit original bills which were required to prove the expenditure incurred by the Appellant. Mr. Kanojia also submitted that the deposition was completely silent on the

² First Appeal No. 410 of 2016 dated 18th April, 2023.

³ 2012(2) Mh.L.J. 710.

permanent impact on his job prospects. Mr. Kanojia thus submitted that this Appeal be dismissed.

13. I have heard Mr. Dalal, learned Counsel for the Appellant and Mr. Kanojia, learned Counsel for the Respondents Nos. 1 and 2 and with their able assistance, I have perused the papers and proceedings in the matter and considered the rival contentions.

14. On the issue of whether the accident was caused due to the rash and negligent driving of the Santro car bearing registration no. No. MH-12-DE-371, the Tribunal has held that the Appellant has contributed to the accident by driving motorcycle without driving license and that his contributory negligence was to the extent of 25%. It is noted that vide Civil Application No. 2815 of 2017 the Appellant has produced his driving license issued on 28th March, 2002. Upon examination of the driving license attached as Exhibit "A" to the Civil Application, it emerges that the same was issued on 20th March, 2002 and was valid till 2nd February, 2020 i.e. valid and effective at the time of the accident on 18th June 2009. No contrary evidence has been brought on record by the Respondents No.1 and 2 that the said driving license was not valid and effective. Therefore the only ground on which the Tribunal held that the Appellant has contributed to the accident

has turned out to be erroneous and therefore there cannot be contributory negligence attributed to the Appellant.

15. I have also examined copy of the Judgment and Award in Motor Accident Claim Petition No. 8 of 2011 dated April 26, 2012 passed by the Motor Accident Claims Tribunal, Latur, filed by one Mr. Ganesh s/o Sambhaji Dantro, who was the pillion rider with the Appellant at the time the accident took place where the Tribunal after examining the evidence on record has held that the claimant being the pillion rider behind the Appellant, had proved that the accident occurred due to the rash and negligent driving of the driver of the Santro car bearing registration No. MH-12-DE-371 . Therefore on the principle of parity, comity and amity laid down by the Hon'ble Supreme Court in the case of *Machindranath Kernath Kesar v. D.S. Mylarappa and Others*⁴, this Court is of the view that the accident took place due to the rash and negligent driving of Santro car bearing registration no. MH-12-DE-371 by driver of Respondent No.1 on 18th June, 2009 at 4:30 p.m. at Bota shivar on Pune Nashik road and in view of the fact that the Appellant was holding a valid driving license at the time of the accident, in my view, there is no contributory negligence on the part of the Appellant.

⁴ (2008) 13 SCC 198

16. On the issue of whether the Appellant suffered permanent disability on account of the accident, from the evidence recorded by Dr. Shashikant Thorat before the Court Commissioner and his cross examination by Advocate for Respondent No.2 that even after removal of implant, the Appellant will suffer about 15 to 20% disability and the Form Comp. 'B' issued by the Medical Officer Incharge, B.J. Medical and Sassoon General Hospital, that the Appellant has 16% permanent disability, it emerges that there is permanent disability of 16% on account of the accident. The Respondents No.1 and 2 have argued that the Appellant did not prove his permanent disability certificate by examining either the treating doctor or Medical Officer who issued the certificate and the Appellant had visited Dr. Thorat who certified his disability percentage, for post operative treatment and he was not the doctor who had treated the Appellant. On this issue, paragraph 24 of the decision of the Hon'ble Supreme Court in the case of *Raj Kumar v. Ajay Kumar (supra)* is usefully reproduced as under:

“24. In this case, the Tribunal acted on the disability certificate, but the High Court had reservations about its acceptability as it found that the injured had been treated in the Government Hospital in Delhi whereas the disability certificate was issued by a District Hospital in the State of Uttar Pradesh. The reason given by the High Court for rejection may not be sound for two reasons. Firstly, though the accident occurred in Delhi and the injured claimant was treated in a Delhi hospital after the accident, as he

hailed from Chirori Mandi in the neighbouring district of Ghaziabad in Uttar Pradesh, situated on the outskirts of Delhi, he might have continued the treatment in the place where he resided. Secondly, the certificate has been issued by the Chief Medical Officer, Ghaziabad, on the assessment made by the Medical Board which also consisted of an orthopaedic surgeon. We are therefore of the view that the High Court ought not to have rejected the said disability certificate.”

17. I have perused the examination-in-chief of Dr. Shashikant Thorat who was a qualified M.S. (Ortho) whom the Appellant visited for post-operative treatment, wherein Dr. Thorat has clearly deposed that the implants in the Appellant's leg will have to be removed by operation in future. I have also perused Dr. Thorat's cross examination by Advocate for Respondent No.2 where Dr. Thorat has stated that even after removal of implant surgery the Appellant will suffer 15 to 20% disability. Since Dr. Thorat was a treating doctor whom the Appellant had visited for post-operative treatment, in the light of the discussion in paragraph 24 of the decision in the case of *Raj Kumar v. Ajay Kumar (supra)*, his evidence ought to be considered.

18. I have also examined the Medical Certificate (Form Comp B) issued by the Medical Officer Incharge, B.J. Medical College & Sassoon General Hospital, Dr.S.S. Shintre also being qualified as M.S. (Ortho)

wherein Dr. Shintre has certified that the Appellant has final permanent disability of 16%. Therefore, Appellant's 16% permanent disability on account of the accident cannot be disputed.

19. Now coming to the issue of the compensation, the Tribunal held that the Appellant had filed xerox copies of discharge card, bills of medicine, hospital but those were not shown to the witness to prove them by secondary evidence and hence the same could not be relied upon and that the Appellant was not entitled to hospital/medicine charges, leave encashment, future expenses, pain and sufferings, conveyance allowance and special diet allowance, loss of earnings in future etc., since basic requirements for grant of above compensation were not proved by the Applicant. The Tribunal, in my view, had erroneously rejected the deposition of witness no.4, Smt. Manjusha Somnath Kulkarni, administrator and legal adviser at Ruby Hall Clinic with respect to the hospitalization of the Appellant from 19th June, 2009 to 2nd July, 2009 in respect of the total hospitalization bill being Rs.70,398/-. Her examination- in-chief as well as her cross-examination have been perused and the same is uncontroverted. Therefore this Court is of the view that the Appellant is entitled to reimbursement of the hospitalization bill.

20. In the light of the above discussion, it is clear that the Appellant has suffered permanent disability to the extent of 16% on account of the accident which was caused by the rash and negligent driving of the driver of Santro car bearing registration no. MH-12-DE-371 owned by Respondent No.1 and insured with Respondent No.2. The Appellant is entitled to compensation in accordance with the principles laid down by the Hon'ble Supreme Court in the cases of *Sarla Verma v. Delhi Transport Corporation and others*⁵, *National Insurance v. Pranay Sethi*⁶ and *Kajal v. Jagdish Chand and others*⁷ and therefore this Court is of the view that the Tribunal will have to compute the compensation payable to the Appellant in accordance with the above and the same will be payable jointly and severally by the Respondents No.1 and 2.

21. The judgment and award of the Tribunal is, accordingly, set aside to the above extent. The Tribunal is directed to recompute the total compensation in accordance with the aforesaid discussion and pass an award within a period of eight weeks from the date of the uploading of this order. Let the compensation as computed above be deposited in the Motor Accident Claims Tribunal, Pune, by the Respondents No. 1 and 2 within a period of eight weeks from the date of order of the Tribunal

⁵ 2009 ACJ 1298 (Supreme Court).

⁶ 2017 (16) SCC 680

⁷ (2020) 4 SCC 413

and the Tribunal to make the payment to the Appellant within two weeks of a request made in this behalf.

22. The Appeal and the Civil Application stand allowed and disposed in the above terms. No order as to costs.

(ABHAY AHUJA, J.)

ARTI
VILAS
KHATATE

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by ARTI VILAS
KHATATE
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