



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

FIRST APPEAL NO.4443 OF 2023

The Cholamandalam, M.S. General
Insurance Company Ltd., Through:
it's Divisional Manager, Shop No.13, Ground floor,
Rangalaxmi Niwas, Residence Jalna Road,
Beed, Tq. & Dist. Beed.

Cholamandalam MS General Insurance Co. Ltd.
Shop No.4, Plot No.33, Rokdiya Hanuman Colony,
Opp. LMS Jeweller Jalna Road, Aurangabad.
Through its Authorized Signatory

...APPELLANT

[Ori. Resp. No.3]

VERSUS

- 1] Govind Ramrao Maykar,
Age: 33 years, Occupation : Labour,
R/o. Talewadi,
Tq. Majalgaon, Dist. Beed.
- 2] Bandu Bajirao Mundhe,
Age: 31 years, Occupation : Tractor Owner,
R/o. Jahagirmoha,
Tq. Dharur, Dist. Beed.
- 3] Shriram Bajirao Mundhe,
Age : 33 years, Occupation : Driver,
R/o. as above.

...RESPONDENTS

[Resp. No.1 is ori. Claimant &
Resp. No.2 and 3 are ori. Respondent
No.1 and 2]

...

Advocate for Appellant : Mr. A. G. Choudhari
Advocate for Respondent No.1 : Mr. Kudale Bhagwan S.
Advocate for Respondent Nos 2 & 3 :-Mr. Sarvesh J. Naik h/f. Mr. Amar
Vinayakrao Lavte

...

WITH

CIVIL APPLICATION NO. 11700 OF 2024 IN FA/4443/2023

GOVIND S/O RAMRAO MAYKAR

VERSUS

THE CHOLAMANDALAM M S GENERAL INSURANCE COMPANY LTD
THROUGH ITS DIVISIONAL MANAGER AND ORS.

...

CORAM : ROHIT W. JOSHI, J.

DATE : 13th MARCH, 2025

ORAL JUDGMENT:

1. The Insurance Company/org. respondent No.3 has filed the present appeal under Section 173 of the Motor Vehicle Act, 1988 challenging the judgment and award dated 01.12.2022 passed by the learned Member of Motor Accident Claims Tribunal, Majalgaon in Motor Accident Claim Petition No.11 of 2019.

2. Respondent No.1 met with a road accident on 14.03.2019 while he was riding his motor cycle bearing MH-44/L-4499 and was hit by a tractor owned by respondent No.2 which was driven by respondent No.3 at the time of accident. It is undisputed that the tractor was insured with the appellant/insurance company.

3. Respondent No.1 filed a Claim Petition being Motor Accident Claim Petition No.11 of 2019 under Section 166 of the Motor Vehicles Act, 1988 claiming compensation on account of injury suffered in the said accident. It is undisputed that left leg of respondent No.1 is amputated above the knee on account of said accident. The appellant and respondent Nos.2 and 3 appeared in the matter and opposed the

claim petition on several grounds, including on the ground of contributory negligence on the part of respondent No.1/ org. claimant. It is stated in the written statement that respondent No.1 was plying the motor cycle from the wrong side in a rash and negligent manner resulting a head on collision with the tractor. The learned Tribunal framed issues on rival pleadings and after recording evidence of respondent No.1/Org. claimant and respondent No.3/driver and hearing rival submissions learned Tribunal was pleased to award compensation of Rs.23,87,355/- along with interest at the rate of 7% per annum to respondent No.1/claimant vide impugned judgment dated 01.12.2022.

4. Mr. Choudhari, learned Advocate for the appellant/insurance company has drawn my attention to the pleadings of the appellant and respondent Nos.1 and 2 in their respective written statements and has also taken me through the cross-examination of respondent No.1/claimant to contend that respondent No.1/claimant was principally responsible for the accident and as such the claim ought to have been rejected. He points out that at the relevant time, respondent No.1 was carrying two bags of silk material with him. He contends that the accident has occurred due to the fault of respondent No.1 in as much as he was not supposed to carry the bags while plying the motor

cycle. The learned Counsel for the appellant further contends that as against 65% disability certified by the treating doctor and 80% disability recorded in the certificate issued by the medical board, the learned Tribunal has erred in awarding compensation treating the disability as 100% disability or absolute loss earning capacity.

5. Per contra, Mr.B. S. Kudale, learned Counsel for respondent No.1/claimant contends that there is a variance in pleadings and the case set up by the appellant/insurance company in the cross-examination. He contends that burden of proving negligence as also contributory negligence is on appellant/insurance company which they have miserably failed to discharge. As regards the injury, the learned Counsel points out that the treating doctor has been examined and although the treating doctor has certified that the disability is to the extent of 65% and the medical board has issued certificate stating that the disability is 80%, since respondent No.1 was working as a labour, the disability has to be taken as 100% disability on account of absolute inability to continue with the work that respondent No.1 was doing prior to the accident. He contends that the learned Tribunal was right in awarding compensation treating the disability as 100% since loss of earning capacity is required to be considered and not disability in technical terms.

6. The learned Counsel Mr. Sarvesh J. Naik h/f. Mr. Lavte appearing for respondent Nos.2 and 3 adopts the arguments made by the learned Counsel for appellant- insurance company.

7. Having heard the respective submissions, following points arise for my consideration:

- (i) Has the appellant proved that the accident was an outcome of contributory negligence on the part of respondent No.1/orig. claimant ?
- (ii) What is the percentage of disability that should be considered for awarding compensation to respondent No.1/original claimant ?

Point No.1

8. There cannot be any dispute about proposition that the burden of proving contributory negligence is always on the driver and owner of the offending vehicle and the insurance company. It is necessary for the respondents to make appropriate pleadings in the written statement and to prove the case set up in the written statement during the course of evidence. In the case at hand the pleadings in the written statement do not go hand in hand with the line of cross-examination that was adopted during the course of trial of the claim petition. During the course of cross-examination it is only suggested that the accident has

occurred because respondent No.1/petitioner was carrying silk bags along with him when he met with the accident. This is not the contention raised in the written statement. Contributory negligence also cannot be inferred from the perusal of the police papers and more particularly in the spot panchnama. In that view of the matter I hold that the appellant has failed to prove that the accident had occurred due to negligence or contributory negligence on the part of respondent No.1/ org. claimant.

Point No.2

9. Legal position with respect to injury cases is now well settled that it is not the percentage of injury that matters while computing compensation to be awarded in injury cases, what matters is the loss of earning capacity of a person who suffers injury in a motor accident. In the case at hand, it is not in dispute that respondent No.1 /orig. claimant was engaged as a labour. His left leg is required to be amputated above the knee due to injury suffered in the accident. Having regard to the nature of work of respondent No.1, no fault can be found with the learned Tribunal in awarding compensation treating the disability as 100% disability or 100% loss of earning capacity. In that view of the matter, point No.2 is also answered against appellant.

10. In the light of above, in my considered opinion, the appeal lacks merit and is liable to be dismissed.

11. The appeal stands dismissed with no order as to costs. The amount of compensation deposited by the appellant with this Court along with accrued interest is allowed to be withdrawn by respondent No.1/original claimant.

12. In view of the dismissal of the present appeal, pending Civil Application stands disposed of.

[ROHIT W. JOSHI J.]

Narwade/