

(2019) 07 BOM CK 0147
In the Bombay High Court
Case No : First Appeal No. 660 Of 2017

Bano @ Banubi Rashid Shaikh

APPELLANT

Vs

Kaisar Nasir Beg (Shaikh) And Ors

RESPONDENT

Date of Decision : 29-07-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 166
Code Of Civil Procedure, 1908 — Order 41 Rule 27

Citation : (2019) 07 BOM CK 0147

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : A.C. Darandale, Swapnil Patil, R.H. Dahat, A.B. Gatne

Final Decision : Partly Allowed

Judgement

1. Present appeal has been filed by original claimant for getting enhancement in the compensation granted by the learned Tribunal.

2. The claimant had filed Motor Vehicle Claim Petition No.371 of 2011 before the Motor Accident Claims Tribunal, Ahmednagar, under Section 166

of the Motor Vehicles Act, 1988 for getting compensation. The claimant who was aged 40 years, doing labour work and earning Rs.5000/- to

Rs.6000/- per month in Shevgaon City and other villages, contended that, she has suffered permanent disability due to accident that had taken place on

27-02-2011 at about 04.10 p.m. She was returning from Ape rickshaw bearing MH-17/AJ-503 from Shirur Kasar to Dahigaonshe. The said rickshaw

was dashed by truck bearing No. MH-20/BT-1144 which had come from opposite direction in high speed, rash and negligent manner. In fact the Ape

rickshaw was stationary at that time by the side of the road. The said accident had taken place due to the negligence on the part of truck driver.

Applicant sustained fracture to her right Clavicle and fracture to left Clavicle bone. So also she had serious injuries to Proximal Tibia and Fibula of

Left leg. According to her she has incurred huge expenditure for medical treatment, however the accidental injuries have turned into permanent

disability. The said truck was belonging to opponent No.1 and it was insured with opponent No.2. Opponent No.3 is the owner of Ape rickshaw. It

was also contended that, the Ape rickshaw driver had not taken proper care to avoid accident. Opponent No.4 is the Insurance Company of the

rickshaw. Thus compensation was claimed from all the opponent.

3. Opponents No.1 and 3 though appeared, did not file written statements. Opponents No.2 and 4, the Insurance Companies of respective vehicles

filed written statement and denied all the averments. Both the Insurance companies have blamed the driver of the rival vehicle for the accident and

both of them have taken statutory defences. Both of them have denied that, claimant has sustained permanent physical disability.

4. The claimant has led evidence. Taking into consideration the said evidence and hearing both the sides, the learned Tribunal has granted

compensation of Rs.2,41,800/- to the claimant. Only opponents No.1 and 2 were held liable to pay the said compensation jointly and severally. The

present appeal has been filed by the claimant for enhancement in the said amount.

5. Heard learned advocate Mr. A. C. Darandale for appellant, Mr. Swapnil Patil holding for Mr. R. H. Dahat for respondent No.2. It has been

vehemently submitted on behalf of the appellant "claimant that, the learned Tribunal did not consider the fact that the claimant is a labour and

sustained injuries to hands as well as legs, therefore she is unable to work as before. Therefore, though the physical disability is stated to be 40 % only,

it has effect of 100 % financial loss to the claimant. She was earning Rs.5000/- to Rs.6000/- per month. She was admitted in hospital for about 32

days, underwent four surgeries, yet the Tribunal has wrongly invoked notional income theory and awarded compensation based on income @ of

Rs.3000/-per month. In fact when she has suffered total loss of income, the computation of compensation ought to have been made on that basis.

Further amount towards future prospects, loss of amenities, loss of income during hospitalization has not been considered, therefore, the said

compensation amount deserves enhancement.

6. Per contra, the learned advocate appearing for the respondent No.2 supported the reasons given by the learned Tribunal and submitted that, no

evidence is adduced on the point of income, therefore the learned Tribunal was justified in invoking notional theory.

7. Taking into consideration the fact that, the respondents No.1 and 2 have not filed any appeal challenging the findings in respect of holding driver of

the truck responsible for the accident, the scope of this appeal is limited to the extent of quantum only. Hence, following points arise for determination,

findings and reasons for the same are as follows ;

(1) Whether the learned Tribunal was justified in holding that the claimant has sustained financial disability to the extent of 10 % only ? If not, then to

what extent ?

(2) Whether the learned Tribunal was justified in awarding compensation of Rs.2,41,800/- only to the claimant ?

8. At the cost of repetition it can be said that, there is no challenge to the finding that the accident had occurred due to the sole negligence on the part

of truck driver. Under such circumstance, it was required to be seen as to whether the accidental injuries admittedly received by the claimant during

the course of the accident had caused permanent physical disability to her affecting her entire earning capacity. The quantum would be computed on

the basis of finding to point No.1.

9. In order to prove the disability, the claimant has examined herself and CW.2 Dr. Vijaykumar Narayanrao Deshpande at Exhibit 36. He has proved

disability certificate Exhibit 40 in which it is stated that the disability is about 35 %. He has stated that, because of her disability, the claimant has knee

stiffness and she cannot do heavy work in farm. According to him in future she may or she may not require knee replacement. Thus according to him

only in respect of knee stiffness it appears that he has assessed the permanent disability of the claimant at 35 %. In his examination-in-chief itself he

has stated that the implants have been removed, but then again in cross-examination he says that, the screws and plates were not removed when

disability certificate Exhibit 40 was issued. It will not be out of place to mention here that, the claimant had filed application No.9303 of 2017, under

Order 41 Rule 27 of Code of Civil Procedure to lead additional evidence on the

said point, however the said application has been rejected by this Court on 24-06-2019. Thus when the witness has not stated as to what is the result of his clinical examination, as to whether the movements were restricted, what was the flexion, merely by saying that there was stiffness to the knee, whether it can be said that claimant will not be able to work at all in the farm. In his examination-in-chief itself CW.2 Dr. Deshpande has stated that, she will not be able to do heavy work thereby suggesting that she can do light work. Under such circumstance, I do not agree with the submission on behalf of the claimants that the permanent physical disability of 35 % of the claimant has turned into 100 % financial loss for her, at the most it may be equivalent i.e. 35 %.

10. As regards the income of the claimant is concerned, except her statement there is nothing. It was not expected that, she should had some documentary evidence with her to prove that she is doing labour work. There was no reason to disbelieve her statement that, she is doing labour work but then when it comes to quantum i.e. the income we will have to invoke the notional income theory. The accident had taken place in 2011 and therefore it would be appropriate to hold that she would have been getting at least Rs.4000/- per month. Another fact is also considered that, since she is residing in a village, even if we assume that the agriculture work would be available, yet the question is whether it is available throughout the year or not. Under such circumstance average is required to be considered and therefore her notional income is taken at Rs.4000/- per month.

11. Taking into consideration the income of claimant @ Rs.4000/-per month, in view of decisions in National Insurance Company Ltd. Versus Pranay Sethi and Others, reported in 2017 SCC Online SC 1270 : 2017 ACJ 270,0 the claimant being self employed, 40 % of the said income is required to be added towards future prospects. Here the age of the claimant is stated to be 40 years when the petition was filed in 2011. There is no dispute as regards her age given in the petition, therefore it is taken as 40. By adding the said amount, her income would be Rs.5600/- per month. However, as aforesaid she would have sustained loss of income to the extent of 35 % only, that amount comes to Rs.1960/- per month (35 % of Rs.5600/- per month). Yearly it would be Rs.23,520/- (Rs.1960/-per month X 12 months). Taking into consideration her age as 40 and the decisions in, Sarla Verma

and Others Versus Delhi Transport Corporation and another, reported in (2009) 6 SCC 121, as well as Pranay Sethi (Supra), the just multiplier in this

case would be 15. Thus the total loss of income for the claimant would be Rs.3,52,800/- (Rs.23,520 x 15).

12. Claimant has stated that, she has spent about 1,50,000/- on the treatment and she was hospitalized for 21 days. The learned Tribunal has deducted

amount of Rs.50,000/- towards estimate of implant removal from the bill produced along with list Exhibit 29 on the ground that the doctor has stated

that the implants have been removed. There is no reason for discarding the said calculation and therefore the claimant is entitled to get Rs.56,100/-

towards medical bills at Exhibit 29, so also along with Exhibit 35 she has produced bills amounting to Rs.77,685/-. She is entitled to get the

reimbursement of the same. Therefore, the finding given by the Tribunal that the applicant is entitled to get amount of Rs.1,33,785/-towards medicine

bills and medical bill is accepted. She was hospitalized for about 21 days therefore amount of Rs.5000/- is awarded towards attendance. Further

amount of Rs.10,000/- is awarded towards travelling expenses and miscellaneous expenses.

Further taking into consideration the treatment taken, injuries caused, amount of Rs.1,00,000/- is added towards pain and sufferings and loss of

amenities. Thus in all the claimant is entitled to get compensation of Rs.6,01,585/-. The learned Member had granted amount of Rs.2,41,800/- only

taking into consideration the permanent disability of the claimant at 10 % only which was not justifiable. It was the duty of the learned Member to

award just compensation to the claimant, and therefore, the case is now made out by the claimant for grant of enhanced compensation. As

aforesaid the other respondents have not filed any appeal, the rest of the award deserve to be maintained as it is, points are therefore answered

accordingly. For the aforesaid reasons, following order is passed ;

ORDER

1) Appeal is hereby partly allowed.

2) The award passed in Motor Accident Claim Petition No.371 of 2011, by learned Member Motor Accident Claim Tribunal, Ahmednagar, dated 09-

04-2015 is hereby set aside, to the extent of quantum only and modified as follows ;

â??The claimant is entitled to receive compensation of Rs.6,01,585/- (six lakh one thousand five hundred and eighty five only) including the amount under 'No Fault Liability' from the respondents No.1 and 2 jointly and severally together with interest @ of 7.5 % per annum from the date of the petition till actual realization of the entire amount.

3) Further Clause (4) in the operative order of the impugned Judgment is modified as follows ;

â??After depositing the amount in the Tribunal, amount of Rs.2,00,000/- (two lakh) (Rs.50,000/-already directed to be kept in 'fixed deposit' by the Tribunal) in the name of claimant in the same nationalized bank for a period of five years and remaining amount be paid to her by account payee cheque.â??

4) Rest of the award is maintained as it is.

5) Claimant to pay the deficit Court fee within a period of one (01) month from the date of this order.