

(2019) 08 BOM CK 0125
In the Bombay High Court
Case No : First Appeal No. 2550 Of 2016

Dr. Prashant Pundlikrao Munde

APPELLANT

Vs

Afsarkhan Taherkhan Pathan And Anr

RESPONDENT

Date of Decision : 30-08-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2019) 08 BOM CK 0125

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : S.S. Jadhavar, S.G. Chapalgaonkar, S.S. Rathi

Final Decision : Partly Allowed

Judgement

1. Present appeal has been filed by the original claimant for enhancement in the compensation granted by Motor Accident Claims Tribunal.

2. The present appellant - claimant had filed petition for getting compensation under Section 166 of the Motor Accident Act. It was contended by him that, he met with an accident at about 2.00 p.m. on 17-04-2012 when he was proceeding on motorcycle bearing No.MH-22/ 6870, he was dashed by truck bearing No.MH-26/AD-0331 from back side. The tyre of the truck ran over his both the legs, as a result of which he had received severe injuries. He has taken treatment at Government Hospital, Parbhani and then he was referred to Dhoot Hospital, Aurangabad. He has taken treatment from 17-04-2012 to 21-04-2012. His both the legs were required to be amputated, and therefore, he has suffered permanent physical disability. The said accident was caused due to the sole negligence on the part of the truck driver which was belonging to respondent No.1 and the said truck was insured with respondent No.2 on the date of the accident, and therefore, both the respondents are liable to pay him compensation jointly and severally. The claimant has contended that, he was a medical practitioner, getting income of Rs.20,000/- per month prior to the accident. He has claimed in all compensation of Rs.45,00,000/-.

3. Respondent No.1 filed written statement at Exhibit 14 and respondent No.2 has filed it at Exhibit 21. Both of them have denied the allegations and the manner in which the accident took place as narrated in the petition. They have denied the allegation that the accident took place due to the negligence on the part of the truck driver. It has been contended that, the accident was caused due to the negligence of the claimant himself, and therefore, he is not entitled to get compensation. Age, income and occupation of the claimant has been denied. The Insurance Company has taken statutory defences also.

4. After the issues were framed, claimant has examined himself. So also the truck driver was examined on behalf of the respondent No.1. After taking into consideration the evidence on record and hearing both sides, the learned Chairman, Motor Accident Claims Tribunal, Parbhani by Judgment and award dated 27-01-2016 granted compensation of Rs.22,35,095/- to the petitioner to be paid by 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. The said Judgment and award is under challenge for enhancement in this appeal.

5. Heard learned advocate Mr. S. S. Jadhavar for appellant, learned advocate Mr. S. G. Chapalgaonkar for respondent No.2 and learned advocate Mr. S. S. Rathi for respondent No.1.

6. It has been vehemently submitted on behalf of the appellant that, the learned Chairman failed to consider that, though it was accepted that the claimant has suffered 70 % permanent physical disability yet it was not considered that, he has suffered 100 % loss of income. When both the legs have been amputated, it ought to have been held by the Tribunal that, claimant cannot earn as before. So also the non pecuniary damages have not been properly considered. The learned Tribunal also did not consider that, the claimant was getting income of Rs.20,000/- per month when he himself has entered the witness box and told about the same. The physical disability has been considered equally with the loss of earning capacity, and therefore, the compensation has been awarded for loss of 70 % of income only. Reliance has been placed on the decision in, the First Appeal No.775 of 2013 (The Divisional Manager, Oriental Insurance Company Vs. Shaikh Hasan s/o Shaikh Chand and Others), by this Court decided on 10-12-2013 wherein the 70 % of medical disability was considered as 100 % functional disability and so also the pain and sufferings and other non pecuniary damages have been granted @ of Rs.1,00,000/-. Further reliance has been placed on the observation in, S. Manickam Vs. Metropolitan Transport Corp. Ltd., reported in AIR 2013 Supreme Court 2629, wherein it has been held that,

"The Courts and Tribunals should take liberal approach since law values life and limb in free country in generous scale."

Further reliance has been placed on the decision in, Dinesh Singh Vs. Bajaj Allianz General Insurance Co. Ltd., reported in 2014 AIR SCW 2535, wherein also

60 % of permanent physical disability was considered as 100 % loss of income. Further reliance has been placed on Subulaxmi Vs. M.D., Tamil Nadu State Transport Corporation and Anr., reported in 2012 AIR SCW 5945, wherein it has been held that,

"Permanent disability and loss of future earning are two distinct heads. One head relates to impairment of person's capacity and other relates to sphere of pain and suffering and loss of enjoyment of life."

Lastly reliance has been placed on, Mohan Soni Vs. Ram Avtar Tomar and Ors., reported in 2012 ACJ 583, wherein the relevant factors qua determination were discussed and amputation of left-leg below knee of Cart-puller were taken as loss of 100 % earning capacity.

7. The learned advocates appearing for respondents No.1 and 2 supported the reasons given by the learned Chairman and submitted that, all the aspects have been considered by the learned Chairman and whatever amount has been awarded is just and fair which requires no interference.

8. At the outset it can be said that, since the respondents have not filed any appeal challenging the other findings given by the Tribunal, that is, the applicant met with accident on the given date and he was dashed by the truck belonging to respondent No.1 and insured with respondent No.2. Further it has been proved by the claimant that, the said accident had taken place due to the sole negligence on the part of the truck driver. The Insurance Company has failed to prove any breach of terms of policy, and therefore, company is jointly and severally liable to pay compensation to the claimant along with the owner - respondent No.1. Now the scope of the appeal is limited to the extent of quantum only.

9. The first and the foremost point for determining quantum is as to whether the physical disability sustained by the claimant has turned into 100 % loss of income for the claimant. In this case, the disability certificate Exhibit 36 shows that, the claimant has suffered 70 % permanent physical disability. It is in respect of whole body, whereas as regards the legs are concerned, it is stated as 100 %. The imputation as per the said certificate is below knee or in between the knees and ankle joint. The author of the said disability certificate has not been examined yet it appears that the respondents did not take any objection for exhibiting that document and since the Chairman considered that the certificate being issued by the Medical Officer of Government Hospital, it was treated as quasi public document. Now also there is no challenge to this document on behalf of the respondents, therefore it is not necessary to remand the matter only on that count. The contents will have to be taken as it is, however it says that the amputation is 100 % yet the percentage of the disability has not been stated in clear terms. Mere mention of amputation is 100 % that does not become 100 % permanent physical disability in respect of whole body. Now it is required to be seen as to how it can affect the profession of the claimant and

whether it will then be 100 % loss of income for the claimant.

10. Claimant is a medical practitioner by profession. In his cross it has come that, his qualification is BAMS. That means, he is in the branch of Ayurvedic medicine. He had passed out BAMS in 2006, but it appears that he had started his practice at Yeldari seven to eight months prior to the incident only i.e. on 17-04-2012. He has not explained as to what he was doing from 2006 to 2012. As regards his qualification is concerned, that is BAMS, his activities as medical practitioner are restricted. As a surgeon or MBBS doctor, he is not supposed to perform any operation and he can continue the practice by sitting. He has not come with a case that, after the accident he has given up his 'Sanad' and he has totally closed down his dispensary. With the help of Jaipur Foot he can do the work. The claimant cannot take help of ratio laid down in Mohan Soni Vs. Ram Avtar Tomar and Ors. (Supra), for the simple reason that, in that case the amputation of left leg below knee was of a cart puller in whose life the legs are more important for his survival. No doubt each and every limb of a person is important, however whether the person can survive and carry on his business or day to day activities may be with difficulty is required to be seen. Similarly, in The Divisional Manager Vs. Shaikh Hasan and others (Supra), the lower part of the claimant had become immobile. He was not in position to walk properly and has lost senses of his bowel, so also catheter was to be inserted for the purpose of urine. This was considered and this Court therefore arrived at a conclusion that, there is 100 % functional disability. The ratio laid down in S. Manickam Vs. metropolitan Transport Corp. Ltd., (Supra) cannot be denied. However, when the Courts and Tribunals are required to take liberal approach, an equal duty is on the claimant to place all the cards and plead in clear terms. Here the claimant as aforesaid has not stated that, he has given up his 'Sanad' and will not be able to carry out his practice by sitting at his dispensary. There was no hurdle for the petitioner to examine the treating doctor or even the doctor who had issued the permanent disability certificate. Under such circumstance, the view taken by the learned Chairman that, taking into consideration the amputation below knee, there would be 70 % of loss of income to the claimant is a correct view.

11. Now turning towards the quantum, admittedly the claimant has not produced a single document showing that, he was earning Rs.20,000/- per month. He has not given any reason as to why he has not produced anything on record. He could have produced his dispensary record to show that, he used to attend a particular number of patients daily. At the cost of repetition it can be said that, he has not given any explanation as to what he used to do after passing of BAMS till he started practice seven to eight months prior to the accident. Since only seven to eight months practice was put by him that too at a place called Yeldari which is not even a Taluka place, there is force in the observation by the learned Chairman that, statement of the claimant that he used to earn Rs.20,000/- per month cannot be accepted at all. The learned Tribunal has taken his income @ of Rs.10,000/- per month but at the same time in the same Judgment when reliance was placed by the claimant on the decision in, V. Mekala Vs. M. Ialathi

And Another, reported in 2014 (3) T A C 5 (SC), wherein the income of injured girl who was taking education in 11th Standard was taken @ of Rs.10,000/- per month. Therefore, it would be unfair to place the claimant in the same category. However, it is to be noted that, we are also required to take into consideration the place of practice of the claimant and the duration of practice. His place of practice is Yeldari which is not even a Taluka place and he had put only seven to eight months of practice. Under such circumstance, it would be just and appropriate to consider his income @ of Rs.12,000/- per month. Taking into consideration claimant being a self employed person, who was around 34 years at the time of accident, in view of the decision in National Insurance Company Ltd. Versus Pranay Sethi and others, reported in 2017 SCC Online SC 1270 : 2017 ACJ 2700, 40 % of the said income is required to be added as future prospects. That amount comes to Rs.4,800/- per month. Thus, the income of the claimant is taken @ of Rs.16,800/- per month, yearly it would be Rs.2,01,600/- (Rs.16,800/- per month x 12 months). As aforesaid he would be losing income of 70 % i.e. Rs.1,41,120/- (70% of Rs.2,01,600/-), and taking into consideration the age of the claimant the just multiplier in this case would be 16 and thus the loss of income for the claimant would be Rs.22,57,920/- which he is entitled to get.

12. As regards the non pecuniary damages are concerned, the medical bill on record is to the extent of Rs.69,095/- which has to be reimbursed to him. Further taking into consideration the catena of Judgments relied on by the claimant, it would be appropriate to award amount of Rs.1,00,000/- towards pain and sufferings, Rs.2,00,000/- towards loss of amenities of life and Rs.1,00,000/- towards future medical expenses as well as expenses for crutches / Jaipur Foot etc. Further amount of Rs.25,000/- is required to be awarded towards attendance and transport charges. Thus the claimant is entitled to get compensation of Rs.27,52,015/-. The compensation that has been awarded by the learned Chairman is on the lesser side, and therefore, the said amount deserves to be enhanced by partly allowing the appeal. Hence, following order.

ORDER

1) The appeal is hereby partly allowed.

2) The Judgment and award passed by learned Chairman MACT, Parbhani in MACP No.240 of 2012, dated 27-01-2016 is hereby set aside and modified to the extent of quantum only as follows ;

"Claimant is entitled to get compensation of Rs.27,52,015/- (in words rupees twenty seven lakh fifty-two thousand and fifteen) from respondents No.1 and 2 jointly and severally (inclusive of amount under 'No Fault Liability') together with interest @ 7.5 % per annum from the date of petition till actual realization of the entire amount.

3) Rest of the award is kept as it is.

4) The amount deposited up till now, be adjusted towards the present award.