

(2019) 09 BOM CK 0081

In the Bombay High Court

Case No : First Appeal No. 1355 Of 2012

Kedar Kamlakar Badave

APPELLANT

Vs

Kailash Eknath Lahoti And Anr

RESPONDENT

Date of Decision : 23-09-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2019) 09 BOM CK 0081

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : Monali P. Patil, S.S. Kulkarni, A.B. Gatne

Final Decision : Partly Allowed

Judgement

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

2. The present appellant had filed application under Section 166 of the Motor Vehicles Act for getting compensation for the accidental injuries he had suffered. He had come with a case that, he is a doctor by profession. He owns Maruti Car No.MH-16/E-5404. He was returning to Ahmednagar from Chas at about 10.30 p.m. on 28-05-2007 by driving his own car. At the spot of the accident one truck bearing No.MH-17/T-9191, owned by respondent No.1 and insured with respondent No.2 on the date of the accident, came from opposite direction. The driver of the said truck was rash and negligent, who lost the control over the truck and gave dash to Maruti driven by the claimant. As a result of the accident, claimant suffered serious injuries. He was admitted to Civil Hospital, Ahmednagar first then to Chhajed Hospital, and thereafter, he was shifted to Inlaks Budhrani Hospital, Pune. Even after getting treatment it is his contention that, he has suffered permanent physical disability to the extent of 35 %. The said accident had taken place due to the negligence on the part of driver of the respondent No.1, and therefore, both the respondents are liable to pay him compensation jointly and severally. He had claimed compensation of Rs.16,42,000/- with

interest @ 18 % per annum.

3. Matter proceeded ex-parte against respondent No.1.

4. Respondent No.2 the Insurance Company filed written statement and denied all the averments in the petition including the allegations regarding negligence of the truck driver. It was also contended that, the truck driver had no valid and effective driving licence to drive the truck on the date of the accident, and therefore, there is breach of terms of policy. It had prayed for exonerating itself from the payment of compensation.

5. Taking into consideration rival contentions, issues were framed. Thereafter, evidence has been led by the claimant only. Taking into consideration the evidence on record, the learned Tribunal has held that, the claimant proved that he sustained injuries in the accident arising out of use of truck and the said accident had taken place due to the rash and negligent manner of the driving on the part of truck driver. Claimant has also proved that, he has sustained permanent physical disability. The Insurance Company failed to prove that, there is breach of terms of policy. Under such circumstance, the Member Motor Accident Claims Tribunal, Ahmednagar allowed the petition partly on 06-03-2012 and granted compensation of Rs.4,32,200/- with interest @ 7.5 % per annum from the date of the petition till actual realization of the entire amount from respondents No.1 and 2 jointly and severally. Present appeal has been filed for enhancement in the said compensation.

6. Taking into consideration the limited scope of the appeal, in view of the fact that there is no challenge by the respondents to those issues which have gone against them ; following point arise for determination, finding and reasons for the same are as follows ;

(1) Whether the Tribunal has awarded just and reasonable compensation to the claimant ? If no, what should be the just amount of compensation ?

7. Heard learned advocate Ms. Monali P. Patil holding for learned advocate Mr. S. S. Kulkarni for appellant and learned advocate Mr. A. B. Gatne for respondent No.2-Insurance Company. Respondent No.1 though served, remained absent.

8. It has been vehemently submitted on behalf of the appellant that, the learned Tribunal failed to consider proper income of the applicant. In his petition the claimant had contended that, his monthly income is Rs.12,000/-. In his examination-in-chief he has stated in specific words that, he used to get Rs.10,000/- per month as net income and his annual income was Rs.1,20,000/-, accordingly he used to pay income tax. He has produced Income Tax Return for the year 2006-2007 and the income shown was Rs.99,960/-. He has also stated that, due to accidental injuries, he could not work for about a year and then had filed Income Tax Return for 2008-2009; wherein it was shown that, he has earned Rs.30,280/-. Claimant had examined P.W.2 Dr. S. P. Pokharna who certified the disability. After assessment of disability, it was opined that, the

claimant has suffered 35 % permanent physical disability and it was also stated by the said doctor that, claimant will have difficulty in following routine activities like standing for longtime, working with right upper limb. Taking into consideration the occupation of the claimant as medical practitioner, it ought to have been considered by the learned Tribunal that, he has suffered 100 % financial loss. It was also submitted on behalf of the appellants that, the non-pecuniary damages have not been properly considered.

9. Learned advocate for the appellant relied on the decision in, *Helen C. Rebello (MRS) And Others Versus Maharashtra State Road Transport Corporation and Another*, reported in (1999) 1 Supreme Court Cases 90, wherein the Hon'ble Apex Court had laid down the principles as to which income should be considered for calculating the compensation and how the general principles of estimating damages under the common law should be arrived at. Further reliance has been placed on the decision in, *R. D. Hattangadi Versus M/s. Pest Control (India) Pvt. Ltd. and Others*, reported in AIR 1995 Supreme Court 755, wherein it has been observed that, "While fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

Further reliance has been placed on the decision in, *V. Mekala Versus M. Malathi and Ors.*, reported in (2014) 11 SCC 178, wherein the appellant injured -16 years old at the time of accident, was a brilliant student, studying in XI th Standard. The High Court had enhanced compensation from 6,46,000 to 18,22,000 with interest @ 7.5 % p.a. and then the Hon'ble Apex Court enhanced it further to Rs.30,93,000 together with interest @ 9 % per annum based on principles laid down in *Municipal Corporation of Delhi Versus Uphaar Tragedy Victims Association*, reported in (2011) 14 SCC 481.

Further reliance has been placed on, *Sandeep Khanuja Versus Atul Dande and Another*, reported in (2017) 3 Supreme Court Cases 351. In this case the functional disability of a professional like Chartered Accountant, when it was 70 % permanent physical disability was held to affect his total earning capacity and

accordingly by applying principle of multiplier, compensation has been awarded.

10. Per contra, the learned advocate appearing for the respondent No.2 - Insurance Company submitted that, claimant had filed only one Income Tax Return of the year prior to the accident, when in fact for an average, he ought to have produced at least three Income Tax Returns. The second Income Tax Return is of post-accident period, and therefore, it cannot be considered at all. He relied on the decision in, First Appeal No.718 of 2010 by this Court decided on 14-01-2019; wherein the Income Tax Returns of three assessment years were considered based upon the decision in, Reliance General Insurance Company limited Vs. Shalu Sharma and Others, reported in (2018) 2 Supreme Court Cases 753. He further relied on the decision in, Tejinder Singh Gujral Versus Inderjit Singh And Another, reported in (2007) 1 Supreme Court Cases 508, wherein the income of the practising lawyer was considered @ Rs.45,000/-per year. Further reliance has been placed on, ICICI Lombard General Insurance Company Limited Versus Ajay Kumar Mohanty And Another, reported in (2018) 3 Supreme Court Cases 686, wherein also the Income Tax Returns of three years were taken note of. Similar view was also taken in, Shyamwati Sharma and Others Versus Karam Singh And Others, reported in (2010) 12 Supreme Court Cases 378.

11. Here in this case, at the outset, it is required to be considered that, though the claimant is a doctor i.e. medical practitioner, his qualification is B.A.M.S., that means, he is 'Bachelor of Ayurvedic Medicine'. His income cannot be equated to that of an Allopathic doctor unless concrete evidence to that effect would have been adduced. In his testimony he has stated that, he was practising at two places, one is Chas Tq. Ahmednagar and another is Bhoire Pathar Tq. Ahmednagar since 2001. The accident had taken place on 28-05-2007. He has produced Income Tax Returns for the year 2006-2007 showing his income at Rs.99,960/-. But then he has not produced Income Tax Returns of earlier two years on record to have a comparison or to take into consideration average of the same. Therefore, in view of the decision in, Shyamwati Sharma And Others, Reliance General Insurance Company Limited, ICICI Lombard General Insurance Company Limited and First Appeal No.718 of 2010 (Supra), income on the basis of only one Income Tax Return cannot be considered at all. As regards the another Income Tax Return is concerned, it is admittedly for the subsequent year. One more factor that is required to be considered is that, at the time of filing petition, the claimant has contended that his income is Rs.12,000/- per month. In his testimony he says that his income is Rs.10,000/- per month and then he proceeds to file Income Tax Return of one year only. That means, there was no cogent and concrete evidence to fix or assess the income of the claimant. The learned Member of the Tribunal was not satisfied with the documentary evidence regarding income, and therefore, went on to consider the notional income of the claimant who is a medical practitioner @ Rs.6,000/- per month. No doubt in Tejinder Singh Gujral (Supra), the Hon'ble apex Court had considered the income of advocate at Rs.45,000/- per year but then it is required to be seen that, the accident in that case had taken place on 06-08-1984. Therefore for

accident which had taken place in the year 2007 we cannot take guidance from the said decision. The decision in, V. Mekala Vs. M. Malathi and Ors. (Supra) relied by appellant in which note of decision in R. D. Hattangadi (Supra) was also taken and it has been held that, notional income cannot be considered @ Rs.6,000/- per month. As per para 19, taking into consideration the results of the girl who was then aged 16, the income which she could have earned in future has been taken @ Rs.10,000/- per month. At the most some base can be taken from this decision but we cannot apply the said decision as it is since the present applicant in this case is already a professional and in spite of the fact that he could have filed Income Tax Returns of the previous years, he has not produced them on record. The ratio laid down in Helen C. Rebello (Supra) as well as R. D. Hattangadi (Supra) are taken into consideration while arriving at the notional income which is now required to be invoked in this case in view of the fact that there was no concrete and cogent material to prove the income of the claimant prior to accident. Taking into consideration the fact that basically the claimant is practicing in Ayurveda in rural area since 2001 and the accident had taken place in the year 2007, it would be appropriate to consider his income @ Rs.8,000/- per month. Taking him as 'self-employed', he being aged 32 at the time of accident and further in view of the decision in National Insurance Company Limited Vs. Pranay Sethi and others, reported in (2017) 16 SCC 680, 40 % of the income is required to be added towards future prospects. That amount comes to Rs.3,200/-. Thus the total income for calculation purpose would be Rs.11,200/- per month. Per year it would be Rs.1,34,400/-.

12. It is to be noted that, as per P.W.2 Dr. S. P. Pokharna, the physical disability of the claimant is 35 %. The learned Tribunal has taken it at 25 % and while reducing that percentage, observation is made by the Tribunal that, since he is a doctor, he had only charged material cost from the claimant in his hospital and in view of these admissions what prompted the learned Member was that, P.W.2 Dr. Pokharna had given evidence with a view to help his brother colleague so as to enable him to get more compensation. These observations were in fact uncalled for. When the law prescribes that, a medical practitioner can only give disability certificate then whoever might have given such certificate would have been a brother colleague for the claimant. Such certificate then could not have been discarded only on that count. Therefore, the disability has to be assessed on the basis of testimony of said witness. P.W.2 Dr. Pokharna has only stated that, claimant would find it difficult to work his routine but he has not further specified it. Important point to be noted is that, the claimant has not come with a case that, he has been disqualified from the driving the car. Further taking into consideration the fact that he is BAMS, he is not supposed to stand for longtime for performing any operation or operations to be performed. He has not come with a case that he has surrendered his registration as 'Medical Practitioner' to the competent authority on the ground that he is unable to carry on the practice. The nature of his job, i.e. profession, is more in the nature of consultation which he can definitely do by sitting. Therefore, it will be appropriate to take loss of

income equivalent to the disability assessed by the doctor i.e. the probable loss of income for the claimant would be 35%. That amount comes to Rs.47,040/-. Further taking into consideration the decision in, Sandeep Khanuja (Supra), multiplier method is required to be adopted and taking into consideration the age of the claimant and the decision in, Sarla Verma and others v. Delhi Transport Corporation and another, reported in (2009) 6 SCC 121, the just multiplier in this case would be '17'. Therefore, after applying the multiplier the total future loss of income for the claimant would be Rs.7,99,680/-.

13. It appears from the impugned Judgment that, the learned Tribunal had not considered the grant of non-pecuniary damages. Amount of Rs.7,200/- has been awarded towards hospital charges, Rs.15,000/- towards pain and suffering, Rs.5,000/- towards special diet, Rs.5,000/- towards attendant, all these amounts are very much on the lower side. So also though the bills those have been produced are to the tune of Rs.1,87,268/-, it has been contended that none of the bills have been duly proved by the claimant. The record shows that, he has produced the originals and he has made statement that, he has paid the amount under those bills. In fact those are the receipts which ought to have been exhibited by the Tribunal. It was absolutely not necessary for the claimant to examine the author of those bills/ receipts to prove them. The Tribunal went on to grant Rs.94,000/- towards expenses of medicines. From where this amount has been derived, cannot be ascertained in absence of non- exhibiting of the bills. Therefore, the entire amount which the claimant is claiming i.e. Rs.1,87,268/- granted to him and it is rounded up to Rs.1,87,270/-.

14. The evidence on record would show that, the claimant had sustained fracture to his hands and legs for which he was operated, implant (rod) was inserted in his leg and thereafter he has undergone further surgeries at Pune. Therefore, taking into consideration the multiple surgeries and his right leg has been shortened, it would be appropriate to grant amount of Rs.1,00,000/-towards pain and sufferings and further Rs.1,00,000/- towards loss of comfort and amenities of life. He was hospitalized for about 36 days and therefore taking into consideration the said duration and the special diet, it would be appropriate to award amount of Rs.10,000/- under the said heads. Further the documents show that, he was required to go to Pune for treatment and follow up, and therefore, further amount of Rs.3050/- is awarded towards transportation and miscellaneous expenditure. Thus the claimant is entitled to get compensation of Rs.12,00,000/-. The point is therefore answered accordingly. The amount which has been granted by the learned Tribunal is very much meager taking into consideration the reasons above said. The claimant is claiming compensation of Rs.16,42,000/- and restricted the same to Rs.12,00,000/- for the purpose of Court fees, and therefore, the appeal deserves to be partly allowed. Hence, following order.

ORDER

1) The appeal is hereby partly allowed.

2) The Judgment and award passed by learned Member, Motor Accident Claims Tribunal, Ahmednagar in Motor Accident Claim Petition No.375 of 2008, dated 06-03-2012 is hereby set aside and modified to the extent of quantum as follows ;

"Respondents No.1 and 2 should pay amount of Rs.12,00,000/- (in words rupees twelve lakh) (including principal amount of 'No Fault Liability') to the petitioner together with interest @ 7.5 % per annum from the date of petition i.e. 20-06-2008, till actual realization of the entire amount."

3) The amount deposited towards the impugned award be adjusted towards modified award.

4) After the balance amount is deposited, the original claimant is entitled to withdraw the same and disbursement is as per award passed by learned Tribunal.

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