Presented on : 25.01.2018
Decided on : 09.10.2021
Duration : 3-Y 8-M 14-D

BEFORE THE MOTOR ACCIDENT CLAIMS TRIBUNAL, MUMBAI
APPLICATION NO.276 OF 2018

(Presided over by Dr. Srishty Neelkanth, Member)

Shri Sandeep Sham Tawde
Age 40 years, injured himself
Residing at: Flat No.001, A-Wing,
Shiv Sagar Society, Kherwadi,
Khar (E), Mumbai- 400 051. ... Applicant

Vs.

M/s. Simplex Infrastructures Limited
Simplex House, 27, Shakespeare Sarani,
Joramandir, Kolkata,
West Bengal, India- 700 010. … Opp. Party

And

Reliance General Insurance Co. Ltd.
Policy issuing Branch located at:
Himalaya House, 5th Floor,
B.J.L. Nehru Road, Kolkata,
West Bengal, India- 700 071. ... Insurer

Appearances :-

Mr. Santosh Yelve - Advocate for the Applicant.
Opposite Party absent.
Mrs. Jagruti Thakkar - Advocate for the Insurer.

JUDGMENT
(Delivered on 9th October 2021)

The applicant has prayed for compensation of Rs.5,00,000/- for personal injuries sustained by Sandeep Sham Tawde (hereinafter referred as 'applicant') in a vehicular accident dated 30.10.2017 allegedly caused due to the rash and negligent driving of the Dumper Mixer No.MH-43-U-9120 owned by the Opposite Party and insured with the Insurance company.

2. The brief recapitulation of the facts show that on 30.10.2017 at about 19-30 hrs., the applicant was proceeding on his Motorcycle No.MH-02-DL-9772 from Andheri towards his residence at Khar (East). When he reached near Teachers colony, Kherwadi, Khar (East), at that time one offending Motor Dumper Mixer No.MH-43-U-9120 came in rash and negligent manner and at a high speed from opposite side. One axle from the offending Dumper Mixer suddenly fell in the middle of the road. The applicant's Motorcycle dashed into it due to which the applicant was forcefully thrown over and fell on the ground. The front glass of the helmet, which the applicant was wearing, broke, pierced and cut into the right side of his nose. After the accident, he was moved to Gurunanak Hospital and on the same day he was shifted to S.L. Raheja Hospital where he was admitted from 30.10.2017 to 03.11.2017 for treatment.

3. It is averred that the said accident was of such a nature that it would not have taken place but for the gross negligence and rashness of the driver of the offending vehicle. An offence came to be registered at Kherwadi Police Station against the driver of the offending vehicle vide TAR No.461/2017. At the material time of the accident, the applicant was 42 years old. He was employed with Apollo Munich Health Insurance Co. Ltd. and earning Rs.85,000/- per month. The accident had left a deep scar on his nose which changed his appearance and was

detrimental to his job and hurdle in his career growth. The vehicle in question is owned by the Opposite Party and at the material time, it was validly insured with the Insurance company. The applicant has therefore claimed compensation of Rs.5,00,000/- and just compensation against the owner and Insurer of the vehicle.

4. The Opposite party failed to appear despite service of summons, hence, the case proceeded exparte against it. The Insurance company opposed the claim petition in its written statement (Ex.9) on the ground that the alleged Motor Dumper Mixer No.MH-43-U-9120 was not involved in the alleged accident. Insurer submits that the applicant has failed to produce any document which prima facie proved the involvement of the alleged vehicle. The Insurer contended that the alleged accident occurred due to negligence of the applicant himself. The Insurer though admitted that the alleged Motor Dumper Mixer No.MH-43-U-9120 was insured with this Insurer on the date of the alleged accident. It is further contended that the driver of the Motor Dumper Mixer No.MH-43-U-9120 was not holding a valid and effective driving license at the time of the accident and thereby the Opposite Party had committed a breach of terms and conditions of the policy. It is contended that the claim petition is bad for non-joinder of the driver of Dumper Mixer as a party to the proceeding. The Insurer denied the age, income and occupation of the applicant. With these contentions, the Insurance company has prayed for dismissal of the claim petition.

5. On the basis of rival pleadings of the parties, I have framed the issues (Ex.17) and an additional issue (Ex.17-A) My findings with reasons thereon are given as under:-

No.	Issues		Findings
1.	Whether the applicant proves that he sustained injuries in the accident dated 30.10.2017 which occurred due to the rash and negligent driving of the driver of Motor Dumper Mixer No.MH-43-U-9120?	:	Yes
1 (a)	Does the Insurer prove that the offending Motor Dumper Mixer No.MH-43-U-9120 was not involved in the accident?	:	No
2.	Whether Insurer proves that the Opposite Party has committed breach of terms and conditions of the insurance policy?		No
3.	Is the petition bad for non-joinder of necessary party?	:	No
4.	Is the applicant entitled to compensation? If yes, to what extent and from whom?	:	Yes, **Rs.20,000/-** from Opp. Party and the Insurer.
5.	What order?	:	Application is partly allowed with costs.

REASONS

6. Heard learned Advocates for the applicant and the Insurer. Perused the evidence on record.

7. The applicant- Sandeep (AW1) has examined himself (Ex.25) and placed reliance on self attested photocopy of Aadhar Card of the applicant (Ex.28), original complaint copy of TAR No.461/2017 along with his Statement (Ex.29 colly.) and Certificate of Dr. Vispi Driver dated 11.11.2017 (Ex.34). In an

attempt to prove the functional disability, the applicant has relied on the evidence of Dr. Naresh Khanna, Orthopedic Surgeon (AW2) (Ex.35) and the disability certificate issued by him (Ex.36) and another Disability Certificate (Ex.37). To prove the medical bills, the applicant has examined Sachin Shrikant Patil an employee of the Billing Department of S.L. Raheja Hospital (AW3) (Ex.38). He has filed on record the Medical Bills of the applicant of S.L. Raheja Hospital (Ex.39 colly.). On the other hand, the Insurance company has examined Ravi Jindani, who was working with Reliance General Insurance Co. as an Administrative Officer (DW1) (Ex.42). He has filed on record certified copy of Insurance Policy of Dumper Mixer (Ex.43), certified copy of Terms and Conditions of the Policy (Ex.44) and Notice sent to the insured along with Postal Receipt (Ex.45 colly.).

As to Issue No.1 and 1 (a):-

8. Sandeep (AW1) (Ex.25) has categorically stated on oath that he was proceeding on his Motorcycle No.MH-02-DL-9772 from Andheri towards his residence at Khar (East). When he reached the spot where the Santacruz Flyover ends, near Teachers Colony, Kherwadi, Khar (E), at that time one offending Motor Dumper Mixer No.MH-43-U-9120 came in rash and negligent manner and at a high speed from the opposite side. One axle rod from the offending Dumper Mixer suddenly fell in the middle of the road. The applicant's Motorcycle dashed into it due to which the applicant was forcefully thrown over and he fell on the ground. The front glass of the helmet, which the

applicant was wearing, broke, pierced and cut into the right side of his nose. The oral testimony of the applicant is corroborated by the TAR No.461/2017 along with Statement (Ex.29 colly.). On the other side, the Opposite Party failed to appear and prosecute its case. The driver of the offending vehicle is also not examined.

9. It is the case of the Insurer that there is an improvement by the applicant in his evidence as he has specified the spot of accident. Further, there is delay in lodging the report with the Police. The applicant has stated in his cross-examination that after the accident he fell on the spot on Santacruz flyover where it ends near Teachers colony, Kherwadi, Khar East, Mumbai. He stated that after the accident he was unconscious and two local people took him to Gurunanak Hospital. He contended that he was not aware whether the spot 'Santacruz Flyover' is not mentioned in the report taken by the Police i.e. TAR (Ex.29 colly.).

10. The Advocate of the applicant has argued that the applicant had no legal knowledge and so there was delay in lodging the report. The documents filed on record corroborates to the cause of the accident. I am of the view that in the particular set of circumstances, the delay in lodging the report and not being specific about the words 'Santacruz Flyover' will not damage the case of the applicant.

11. Thus, all these facts lead to an adverse inference that the the accident took place when the applicant's Motorcycle dashed

into the axle rod which had fallen from the offending Dumper Mixer. Due to the impact, the applicant was forcefully thrown over and he fell on the ground. The applicant sustained serious injuries to his nose. The driver of the Motor Dumper was supposed to take proper care while driving the vehicle on the road. In view of this position, I have no hesitation to hold that the applicant has duly proved that the accident took place due to the negligence of the driver of the offending Dumper Mixer. The Insurer on the other hand has failed to prove that the Dumper Mixer was not involved in the accident. Hence, I answer issue No.1 in the affirmative and issue No.1 (a) in the negative.

As to Issue No.2 :-

12. The Insurer has contested the claim petition on the ground that the driver of the offending Motor Dumper Mixer was not holding a valid driving license at the relevant time and thereby Opposite Party had committed a breach of terms and conditions of the policy. To prove the same, the Insurer has examined Ravi Jindani (DW1) (Ex.42), who was working with Reliance General Insurance Co. as an Administrative Officer. He has filed on record certified copy of Insurance Policy of Dumper Mixer (Ex.43), certified copy of Terms and Conditions of the Policy (Ex.44) and Notice along with Postal Receipt (Ex.45 colly.). Ravi (DW1) deposed that the insured had never come to their office and furnished any document to show the involvement of the vehicle on the date of the accident i.e. 30.10.2017. It is seen that in the cross-examination, he admits that he had not

produced any acknowledgement receipt to show that the insured had received the notice. It is not denied that the offending Dumper Mixer was insured with the Insurer on the date of the accident. No further substantial evidence is led by the Insurer to prove its contention. Thus, the lack of evidence negates the contention of the Insurance Company that the Insurance company is not liable to pay compensation to the applicant for breach of terms and conditions of the policy. Accordingly, I answer issue No.2 in the negative.

As to Issue No.3:-

13. The contention of the Insurer is that application is bad for non-joinder of necessary party. It was their contention that the driver of the Motor Dumper Mixer is a necessary party to the proceeding. It is relevant to mention that the applicant has come with a specific case that accident took place due to negligence on the part of the driver of the said vehicle and duly proved the negligence on the part of the driver of the offending vehicle. It is a settled proposition of law that a necessary party is the party in whose absence no effective judgment or decree can be passed. The submission of the Insurer is not acceptable keeping in view the law laid down by the Hon'ble Apex Court in the case of ***Machindranath Kernath Kasar Vs D.S. Mylarappa and Ors. Reported in (2008)13 SCC 198 (SC)*** wherein it is held that the driver of the offending vehicle is not a necessary party. In view of this legal position, I do not find that the claim petition is bad for non-joinder of necessary party. Accordingly, I answer issue No.3 in the negative.

As to Issue No.4:-

14. Now the crucial question of compensation amount has to be decided. It is a settled legal principle that the applicant is not entitled to compensation under the head of functional disability unless it is established that the injuries caused to the victim resulted in functional disability and reduction or loss to his/her earning capacity.

15. Age of the claimant, his/her income and the percentage of loss in earning capacity are the relevant factors to assess compensation in personal injury cases.

16. In the present case, the applicant was aged 42 at the time of accident. According to the applicant, before the accident he was employed with Apollo Munich Health Insurance Co. Ltd. and earning Rs.85,000/- per month. In the cross-examination, he has admitted that after the accident he started working online but he joined office physically after one month and ten days. He stated that he was also working online when he was in the hospital and he was not on medical leave. He has no document to show that he had written to his employer that he would not attend the office physically for one month and ten days. He has not examined the employer to prove his income. On being questioned, in his cross-examination, he replied that he had not been terminated from his earlier company i.e. Apollo Munich Health Insurance Co. Ltd., but he had resigned on his own. He was now working in Renewbuy.com. In such

circumstances, I am of the opinion that the applicant has not been able to prove that he had suffered any loss of income due to the accident. Hence, he is not entitled to get any amount towards the same.

17. In support of the contention that the injured is not entitled for compensation unless it is established that he sustained functional disability, reliance is placed on ***Rajkumar Vs. Ajaykumar and others reported in 2011 ACJ 1 (SC)*** wherein it was enunciated that the tribunal has to find out (i) whether the claimant is totally disabled from earning any kind of livelihood, (ii) whether in spite of permanent disability the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry some other or lesser scale of activities and functions, so that he continues to earn or can continue to earn his livelihood.

18. Hon'ble Apex Court has further enunciated that whether the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earning, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. The same view was taken by Hon'ble Bombay High Court in a case of ***Taj Tours and Travels Vs. Dr. Priti N. Parikh***

1996 (1) ALL MR 237 wherein it has been observed that unless there is positive evidence that the claimant has suffered loss of income due to injuries, it is not permissible to award compensation under the head of loss of future income.

19. In the present case, the Certificate issued by Dr. Vispi Driver (Ex.34) coupled with the disability certificates (Ex.36 and Ex.37) issued by Dr. Naresh Khanna (AW2) support the oral testimony of the applicant that he sustained fracture maxillary bone, injury to right nasal bone and CLW on right nasal wall. Dr. Khanna (AW2) has assessed the permanent partial disability of the applicant as 41% and issued the disability certificate (Ex.36). Dr. Khanna (AW2) has admitted in the cross-examination that the applicant had visited his clinic only once for taking disability certificate. He also admitted that only nasal wall repair was done and no other surgery was done. He also stated that in Certificate issued by Dr. Vispi Driver (Ex.34), it had been mentioned that there were no complaints after the nasal wall repair. He could not assign any reason as to why he had issued two disability certificates (Ex.36 and Ex.37) both issued on 05.08.2019. He also admitted that as per the medical papers of Dr. Vispi Driver (Ex.34), it was mentioned that the scar cream could be used only 'if needed'. Even the applicant (AW1) in his cross-examination has admitted that when he went to Dr. Vispi Driver on 11.11.2017, he was told that the injury on his nose had cleared. So considering the above, I am not inclined to consider the permanent partial disability of 41% as stated by Dr. Khanna (AW2). But, considering the nature of

injuries, it can be presumed that the applicant must have suffered pain and suffering and the aforesaid injuries must have resulted in some physical disability, for a temporary period though. Such an injury not only leads to physical disability but creates an impact on the injured person to feel that he is not a normal person. Therefore, in my considered opinion, the applicant is entitled to compensation of **Rs.5,000/-** each under the head of physical disability and pain and suffering.

20. While assessing the compensation, it cannot be overlooked that even if the income of the applicant has not been reduced but bodily injury is to be treated as deprivation which entitles the victim to claim damages which depends upon the gravity of the injury. The object of providing compensation is to place the claimant as far as possible in the same position financially as he was before the accident. Therefore, proactive approach needs to be adopted and adequate compensation needs to be awarded to the claimant including pecuniary and non-pecuniary damages. In the present case, it would be desirable to grant compensation of **Rs.5,000/-** towards the deprivation of amenities and pleasure to which the applicant was entitled before the accident. The applicant is further entitled **Rs.2,500/- each** towards special diet and conveyance.

21. In addition to this, applicant has produced on record Medical Bills worth Rs.1,44,954/- (Ex.39 colly). To prove the medical bills, the applicant has examined Sachin Shrikant patil, Team Leader, Billing Department at S.L. Raheja Hospital (AW3)

(Ex.38). Sachin (AW3) deposed that the applicant was admitted in S.L. Raheja Hospital from 30.10.2017 to 03.11.2017. He further deposed that he had issued duplicate bills to the applicant and the original bills had been submitted to Family Health Plan Ltd. In the cross-examination, he stated that the total bill of the applicant was Rs.1,44,954/- and they had received Rs.1,17,366/- from the insurance policy taken by the employer. The original bill was given to the Third Party Administrator and the original receipt was given to the relatives of the patient who had paid the bill amount. This shows that the entire medical expenses had been borne by the employer through the insurance policy. Though the applicant deposed that certain percentage of this expenditure on medical bills were borne by him, but he has failed to prove the same.

22. The applicant is, thus, entitled to compensation under following heads:-

	Amount in rupees
Physical Disability	**: Rs.5,000/-**
Pain and Suffering	**: Rs.5,000/-**
Loss of amenities of life	**: Rs.5,000/-**
Special Diet and Conveyance	**: Rs.5,000/-**
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Total	**: Rs.20,000/-**

23. Now the pivotal question is regarding the liability to pay the compensation amount. The accident took place solely because of rash and negligent driving of the driver of the Motor Dumper Mixer No.MH-43-U-9120. The Opposite Party was the owner of the Motor Dumper Mixer which was insured with the

Insurance company at the time of accident. Therefore, I am inclined to hold that Opposite Party and Insurance company are liable to pay compensation jointly and severally. Hence, I answer issue No.4 accordingly.

As to Issue No.5:-

24. It is well settled that it is the duty of the Tribunal to hold just, equitable, fair and reasonable compensation with reference to the settled principles on assessment of damages. Considering the date of the application and the facts and circumstances before me, I am of the view that interest @7% p.a. would be just and proper in the instance case. With this I am inclined to pass the following order:-

ORDER

1} Application stands partly allowed with proportionate costs.

2} The Insurance company and the Opposite Party do jointly and severally pay a sum of **Rs.20,000/-** [Rupees Twenty Thousand only] to the applicant with interest @7% p.a. from the date of application.

3} On realization, entire amount alongwith interest be paid to the applicant by account payee cheque, on due identification and verification.

4} Deficit court fee, if any, be recovered from the applicant.

5} Award be drawn accordingly.

(Dr. Srishty Neelkanth)
Member, C.R. No.3
MACT, Mumbai

Date : 09.10.2021

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