

IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 9TH DAY OF JULY 2019

BEFORE

THE HON'BLE MR.JUSTICE P.G.M. PATIL

M.F.A.CROB.NO.100089 OF 2016 (MV)
C/W.
M.F.A. NO.103257 OF 2015

IN M.F.A.CROB.NO.100089 OF 2016
BETWEEN :

HUSSAIN BASHA S/O LATE MOULA SAB,
AGED ABOUT 25 YEARS,
EX-AGRICULTURAL COOLIE-CUM-MILK VENDOR,
R/O: KUDUDHARAHAL VILLAGE,
SIRUGUPPA TQ, BALLARI DISTRICT.

...CROSS OBJECTOR

(BY SRI.Y. LAKSHMIKANT REDDY, ADVOCATE)

AND

1. MALLIKARJUNA G, S/O G. POMPANNA,
AGED ABOUT 33 YEARS,
DRIVER OF THE TATA ACE LMV/
GOODS BEARING NO.AP-21/Y-6802,
R/O: PEDDA TUMBALAM, ADONI TQ,
KURNOOL DISTRICT, ANDHRA PRADESH.
2. ISMAIL T, S/O HUSSAIN SAB,
AGED ABOUT 53 YEARS,
OWNER OF THE TATA ACE LMV/

MFA.CROB.NO.100089/16
C/W.MFA.NO.103257/15

GOODS BEARING NO.AP-21/Y-6802,
R/O: TANGARADONA,
ASPARI MANDALAM,
TQ, KURNOOL DISTRICT,
ANDHRA PRADESH.

3. THE MANAGER,
NEW INDIA ASSURANCE CO.LTD.,
EDIGA COMPLEX, BALLARI.

... RESPONDENTS

(NOTICE TO RESPONDENT NOS.1 AND 2-DISPENSED
WITH)
(BY SRI.N.R.KUPPELUR, ADVOCATE FOR R-3)

THIS CROSS OBJECTION IS FILED UNDER ORDER
XLI RULE 22 OF CODE OF CIVIL PROCEDURE READ
WITH SECTION 173(1) OF M.V.ACT, 1988 AND PRAYED
FOR MODIFY THE ORDER DATED 22.07.2015 PASSED
IN M.V.C.NO.863 OF 2013 BY M.A.C.T.-II, BALLARI AND
PASS SUCH OTHER ORDER OR ORDERS AS THIS
COURT DEEMS FIT IN THE CIRCUMSTANCES, IN THE
INTEREST OF JUSTICE AND EQUITY.

IN M.F.A. NO.103257 OF 2015
BETWEEN:

THE DIVISIONAL MANAGER,
THE NEW INDIA ASSURANCE COMPANY LIMITED,
DIVISIONAL OFFICE,
EDIGA COMPLEX, BELLARY
REPRESENTED THROUGH ITS
REGIONAL OFFICE, 2ND FLOOR,
SRINATH COMPLEX, NCM, HUBBALLI,

REPRESENTED BY ITS
CHIEF REGIONAL MANAGER.

... APPELLANT

(BY SRI.N.R.KUPPELUR, ADVOCATE)

AND

1. HUSSAIN BASHA S/O LATE MOULA SAB,
AGE:25 YEARS, OCC:AGRL AND MILK VENDOR,
E/O:KUDUDHARAHAL VILLAGE,
TQ:SIRGUPPA, DIST:BELLARY.

2. MALLIKARJUNA G S/O G POMPANNA,
AGE:32 YEARS, OCC: DRIVER,
R/O:PEDDA TUMBALAM VILLAGE,
TQ:ADONI, DIST:KURNOOL,
STATE: AP.
(DRIVER OF THE TATA ACE VEHICLE
NO.AP-21/Y-6702)

3. ISMIAL T S/O HUSSAIN SAB,
AGE:52 YEARS, R/O: TANGARADONA
ASPARI MANDALAM,
DIST:KURNOOL, STATE: AP.

(OWNER OF THE TATA ACE VEHICLE
NO.AP-21/Y-6702)

... RESPONDENTS

(BY SRI.LAKSHMIKANT REDDY, ADVOCATE FOR R-1)
(NOTICE TO RESPONDENT NO.2-SERVED)
(BY SRI.B.SHARANABASAWA, ADVOCATE FOR R-3)

THIS APPEAL IS FILED UNDER SECTION 173(1) OF
THE MOTOR VEHICLES ACT, 1988, AND PRAYED TO
SET ASIDE THE AWARD DATED 22.07.2015 PASSED IN

M.V.C.NO.863 OF 2013 ON THE FILE OF MOTOR ACCIDENT CLAIMS TRIBUNAL-II, BALLARI AS AGAISNT THE APPELLANT IN THE INTEREST OF JUSTICE.

THE ABOVE CROSS-OBJECTION AND APPEAL ARE COMING ON FOR ADMISSION, THIS DAY, THE COURT MADE THE FOLLOWING :-

JUDGMENT

The Insurer-New India Assurance Company Limited and the claimant being aggrieved by the Judgment and Award dated 22.07.2015 passed in M.V.C.No.863 of 2013 by the Motor Accident Claims Tribunal-II, Ballari have filed these appeal and Cross-Objection.

2. It is the case of the claimant before the Tribunal that, on 01.02.2013 at about 2.00 p.m. one Mahesh who was driver of the Auto bearing Registration No.AP-21/TW-0438 had come from Halvi side with a patient for treatment to Harihar Clinic at Kududrahal and he had parked the vehicle on the left side of the

road. Petitioner was standing behind the parked auto and at about 2.30 p.m. one TATA ACE vehicle bearing Registration No.AP-21/Y-6702 driven by the respondent No.1 came in a high speed and in a rash and negligent manner and dashed against the petitioner, due to that he fell down on the road and sustained grievous injuries. Immediately, he was shifted to Hatcholli Hospital for treatment and on the same day he was shifted to VIMS Hospital, Ballari and he took treatment as in patient from 01.02.2013 to 29.03.2013 and he underwent operation of his left leg and his left leg was amputated above the knee and thereafter also he took further treatment from private doctors at Ballari and till today, he is under medical care and he has incurred a sum of Rs.2,50,000/- towards medical expenses. Petitioner was quite hale and healthy and is aged about 21 years and was doing agricultural coolie-cum-milk vending business and he was earning Rs.500/- per day and he was maintaining his family consisting of his

mother, his wife and two minor children and due to the accidental injury the petitioner is not in a position to do his activities and he is not in a position to sit squat properly and is not in a position to have sexual life with his wife. Therefore, he claimed compensation amount of Rs.25,00,000/- against the owner and insurer of the offending vehicle.

3. In response to the notice, respondent Nos.1 and 2 did not appear before the Tribunal and they were placed *ex-parte*. The 3rd respondent appeared before the Tribunal through his counsel and filed written statement denying the accident as stated by the petitioner and he has denied that the TATA ACE vehicle was insured with him. He has further contended that the respondent No.1 was not holding valid permit and valid driving licence to drive the said vehicle. He has also denied that the accident took place due to the rash and negligent driving of the respondent No.1. He has

denied the age, occupation and income of the claimant. He has denied that due to the accidental injuries the left leg of the petitioner has been amputated and he is not in a position to sit squat properly and he has lost entire earning capacity. He has also denied that the operation was done to the petitioner and he has incurred a sum of Rs.2,50,000/- towards medical and other expenses. He has further denied that the petitioner is suffering from disability to the extent of 80%.

4. On the basis of the pleadings of the parties, the Tribunal framed issues. In support of the claim petition, claimant got examined himself as PW-1 and another witness as P.W.-2 and got marked twenty nine documents as Ex.P.1 to Ex.P-29. On the other hand, the respondent No.3-Insurance Company examined its official witness as RW-1 and got marked two documents as Ex.R.-1 and 2.

5. The Tribunal after hearing both the parties, passed the impugned Judgment awarding compensation amount of Rs.11,48,670/- with interest at the rate of 6% per annum from the date of petition till the date of realization. Respondent No.3-Insurer was directed to deposit the compensation amount within two months from the date of award.

6. The appellant-Insurer being aggrieved by the Judgment and Award has filed M.F.A.No.103257 of 2015 on the grounds that the Tribunal committed error of law and facts in making the appellant liable to pay the compensation, ignoring that there was breach of policy conditions as the driver of the vehicle did not possess driving licence to drive the said vehicle and he was not authorized to drive the transport vehicle. The Tribunal committed error of law and facts in granting excessive compensation under the head of loss of future income taking the disability of 80% for the amputation

of the left leg above knee and that the amputation of left leg above the knee is a schedule injury as per the workmen's compensation schedule the functional disability would be 60%.

7. The appellant-claimant being dissatisfied with the Judgment has filed M.F.A. Cross objection No. 100089 of 2016 seeking enhancement of compensation on the ground that the Tribunal has erred in considering his disability at 80% when the evidence of PW-2 shows that his disability is 85%. The Tribunal has erred in considering the income of the claimant at Rs.6,000/- per month and the Tribunal has awarded meager sum under the head of pain and suffering and loss of amenities.

8. Heard the learned counsels for the parties in both the matters.

9. A short question which arises for consideration in the appeal and Cross objection is as to whether the

appellant-Insurer has made out grounds for setting aside the liability saddled against him and to reduce the compensation and whether the claimant has made out grounds for enhancement of the compensation?

10. The first ground on which the appellant-Insurer has sought for setting aside the liability saddled against him is that the driver of the offending vehicle did not possess a valid and effecting driving licence to drive the vehicle involved in the accident. The Insurer himself has produced the copy of the driving licence at Ex.R-2 in respect of driver of the offending vehicle stating that the driver had license to drive light motor vehicle non transport and the same was valid as on the date of the accident. But the vehicle involved in the accident is transport vehicle for that he was not authorized to drive the same and therefore, there is a breach of policy conditions. This contention of the Insurer is not available in view of the Judgment of the Hon'ble

Supreme Court in the case of **MUKUND DEWANGAN V. ORIENTAL INSURANCE COMPANY LIMITED**, reported in **AIR 2017 SC 3668**, in which it is held that “when a person is having valid driving licence to drive light motor vehicle non transport he need not obtain special endorsement for driving LMV transport vehicle and therefore in the present case the driver of the offending vehicle had valid driving licence to drive LMV non transport vehicle and therefore there was no requirement of special endorsement for driving the light motor transport vehicle involved in the accident. Therefore, there is no breach of policy conditions. Under these circumstances, the insurer cannot avoid his liability to pay the compensation.

11. The learned counsel for the Cross Objector - claimant relying on the Judgment in the case of **MOHAN SONI v. RAM AVTAR TOMAR AND OTHERS**, reported in **2012 ACJ 583** and the Judgment of this Court in the

case of **H.BASAVANAGOUDA @ BASAVA S/O. DODDABASAPPA V. HUSSAINI S/O.THIPPANNA AND OTHERS** in **M.F.A.NO.23417 OF 2013 (MV)** connected with **M.F.A.NO.20844 OF 2013 (MV)** decided on 29.10.2018 submitted that in the present case permanent functional disability of the claimant has to be considered at least as 90% of the whole body as there is amputation of his left leg at knee level. Further, the learned counsel for the cross objector-claimant submitted that he is entitled for addition of 40% of the income towards future prospects and that the compensation awarded under the head of pain and suffering and loss of amenities needs to be enhanced.

12. *Per Contra*, the learned counsel for the Insurer submitted that the permanent disability suffered by the claimant falls under the schedule of the Workmen's Compensation Act and that in such a case functional disability would be 60% and therefore, the

permanent disability of the claimant cannot be considered as 90% of the whole body.

13. The claimant contended before the Tribunal that he was doing agricultural coolie work cum milk vending business and was earning Rs.500/- per day and maintaining his family consisting of mother, wife and two minor children. In support of the same, claimant has not produced any positive evidence before the Tribunal. Therefore, in the absence of such evidence, the Tribunal has considered the income of the claimant at Rs.6,000/- per month. Considering the age and occupation of the claimant and the year of the accident i.e., 2013 and in view of the guidelines provided for settlement of the cases in Lok-Adalath, it is just and necessary to consider the income of the claimant at Rs.7,000/- per month for the purpose of awarding compensation.

14. The Tribunal has considered the permanent disability of the petitioner at 80% of the whole body and accordingly awarded compensation towards loss of future earning capacity. In the decision of **MOHAN SONI'S** case referred *supra* the Hon'ble Supreme Court has held in paragraph No.10 as follows :

“10. In the light of aforesaid decisions we find it extremely difficult to uphold the decision of the High Court and the Tribunal based on the findings that the loss of the appellant's earning capacity as a result of the amputation of his left leg was only 50 per cent. It is noted above that the appellant used to earn his livelihood as a cart puller. The Tribunal has found that at the time of the accident his age was 55 years. At that age it would be impossible for the appellant to find any job. From the trend of cross-examination it appears that an attempt was made to suggest that notwithstanding the loss of one leg the appellant could still do some work sitting down such as selling vegetables. It is all very well to theoretically talk about a cart puller changing his work and becoming a vegetable vendor. But the

computation of compensation payable to a victim of motor accident who had suffered some serious permanent disability resulting from the loss of a limb, etc. should not take into account such indeterminate factors. Any scaling down of the compensation should require something more tangible than a hypothetical conjecture that notwithstanding the disability, the victim could make up for the loss of income by changing his vocation or by adopting another means of livelihood. The party advocating for a lower amount of compensation for that reason must plead and show before the Tribunal that the victim enjoyed some legal protection [as in the case of persons covered by *The persons with disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995*] or in case of the vast multitude who earn their livelihood in the unorganised sector by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving a certain income. The loss of earning capacity of the appellant, according to under Section, may be as high as 100 per cent but in no case it would be less than 90 per cent. We, accordingly, find and

hold that the compensation for the loss of appellant's future earnings must be computed on that basis. On calculation on that basis, the amount of compensation would come to Rs.3,56,400 and after addition of a sum of Rs.30,000 and Rs.15,000 the total amount would be Rs.4,01,400. The additional compensation amount would carry interest at the rate of 9 per cent per annum from the date of filing of the claim petition till the date of payment. The additional amount of compensation along with interest should be paid to the appellant without delay and not later than three months from today."

The facts in that case were that the left leg of the claimant was amputated below knee and the Hon'ble Supreme Court also considered the schedule-I in the Workmen's Compensation Act, 1923 and rejected the arguments advanced by the respondents in the said case that disability could not be reckoned above 50%. On the other hand, the Hon'ble Supreme Court held that the permanent disability in that case would not be

less than 90%. In the Judgment of **H.BASAVANAGOUDA @ BASAVA'S** case stated *supra* the division bench of this Court fallowing the Judgment in the **MOHAN SONT'S** case stated *supra* has held that where the amputation of the leg was at the knee level, the permanent disability of 90% of the whole body was considered for awarding compensation towards loss of earning capacity.

15. Under these circumstances, in the present case also the claimant has produced certificate for the persons with disability issued by the Medical Board at Ex.P-23, in which, it is stated that the amputation is above the knee. However, in Ex.P-20 the discharge summary, it is stated that, "traumatic auto amputation of left lower limb below knee joint". Therefore, the amputation of the left leg of the petitioner was made at knee level.

16. Under these circumstances, the permanent functional disability of the claimant has to be taken as

90% of the whole body, accordingly, compensation has to be awarded towards loss of earning capacity. Thus, on re-assessment the following just compensation is awarded. The income of the claimant is considered at Rs.7,000/- per month and he is also entitled for addition of 40% towards the future prospects as held in the Judgment stated *supra*. Thus, his income comes to Rs.7,000/- + 40% (future prospects Rs.2,800/-) = Rs.9,800/- same has to be multiplied by 12 and 18 X 90% (disability). Thus, the claimant is entitled for compensation amount of Rs.19,05,120/- towards loss of future earning capacity due to permanent disability. The Tribunal has awarded a sum of Rs.50,000/- under the head of pain and agony which is enhanced to Rs.1,00,000/-. Medical expenses of Rs.14,870/- awarded by the Tribunal is retained. For the loss of earnings during the treatment period of three months, a sum (Rs.7,000/- X 3 months = Rs.21,000/-) is awarded. The sum of Rs.10,000/- awarded towards future

medical expenses is retained. The Tribunal has awarded a sum of Rs.25,000/- under the head loss of amenities and un happiness, in view of the Judgment in the case of **H.BASAVANAGOUDA @ BASAVA'S** stated *supra*, Rs.1,00,000/- is awarded under this head. Thus, the claimant is entitled for a total compensation amount of Rs.21,50,990/- as against Rs.11,48,670/- awarded by the Tribunal. Accordingly impugned Judgment and Award is modified. The point for consideration is answered accordingly. In the result, this Court proceed to pass the following :

ORDER

The appeal in M.F.A.No.103257 of 2015 is hereby dismissed. The Cross Objection in M.F.A.CROB.No. 100089 of 2016 is allowed in part. The claimant is awarded compensation amount of Rs.21,50,990/- along with interest at the rate of 6% per annum from the date of petition till its realization.

MFA.CROB.NO.100089/16
C/W.MFA.NO.103257/15

Order as to deposit and disbursement shall be in terms of the order of the Tribunal.

The amount in deposit made in M.F.A.No.103257 of 2015 shall be transmitted to the concerned Tribunal forthwith.

Sd/-
JUDGE

ckk