

IN THE HIGH COURT OF BOMBAY AT GOA.

FIRST APPEAL NO. 47 OF 2010

Smt. Eufemia de Souza

wife of Bernardino Salvador Faria

aged 58 years, businesswoman,

resident of house No.122, Pocal Verna,

Salcere Goa

..... Appellant

V/s.

1. Shri Indrabahadur Vishwakarma

son of Zankar Vishwakarma

driver of vehicle bearing registration

number GA01-W-7615 resident of Altat

House, Curti, Phonda Goa.

2. M.A. Vijayanandh Roadline Ltd.

Owner of vehicle bearing registration

number GA01-W-7615

Jayce nagar, Rodrigues Building,

Near Honda Activa Show Room,

Ponda Goa.

3. National Insurance Company Ltd.

Insurer of vehicle bearing registration

number GA01-W-7615,

Nic Building, 18, India Exchange Place,

Ground floor, Kolkatta 700001,

... Respondents

West Bengal

Shri S.S. Kakodkar, Advocate for the appellant.

Shri C. A. Coutinho, Advocate for the respondents.

CORAM : NUTAN D. SARDESSAI, J.

RESERVED ON : 1st JULY,2016.

PRONOUNCED ON : 21st JULY,2016.

JUDGMENT:

This is an appeal by the original claimant challenging the judgment and award dated 11/12/2009 passed by the learned Motor Accident Claims Tribunal, Margao ("the Tribunal" for the short) by which the learned Presiding Officer secured her partly with the compensation and without appreciating her case in its proper context. The respondents are the original respondents before the tribunal and all of whom would be referred to in their original status for the brevity's sake hereinafter. It needs reckoning that no separate appeal or cross appeal was filed on behalf of the respondent no.3 in particular challenging the award and therefore the limited scope of challenge in this appeal is restricted to the quantum of compensation awarded by the learned Presiding Officer.

2. Shri S.S. Kakodkar, learned Advocate came to be heard on behalf of the appellant who adverted to the impugned judgment and award and submitted that the learned Tribunal had not given due weightage to the fact that the claimant was running a bar apart from doing agricultural work and therefore failed in appreciating the income of the applicant and ultimately to award lower

compensation to her. The learned Tribunal had also not given due consideration to the extent of loss of income and/or that under the head of permanent disability and therefore was entitled to a reversal of the award to the limited extent of the quantum. He relied in **Raj Kumar Vs. Ajay Kumar and another**[(2011)1 SCC 343] and **Smt. Sarla Verma and Others v/s Delhi Transport Corporation and another** [2009(4) ALL MR 429] in the matter of applicability of the multiplier.

3. Shri C.A. Coutinho, learned Advocate for the respondent nos. 1 and 2 contended that there was no functional disability while adverting to the cross-examination of the Orthopaedic Surgeon and that the amount awarded to her of ₹60,000/- would cover her short comings. Shri S.S. Kakodkar, learned Advocate in reply adverted to the evidence of his witnesses and submitted that even assuming without admitting that she had not suffered permanent partial disability, she was still entitled to the compensation claimed in the petition.

4. At the cost of repetition, there was no appeal at the instance particularly of the insurer and therefore the findings of the learned Tribunal on the aspect of rash and negligent driving remained uncontroverted and need not detain me further in

assessing the appeal as a whole. In so far as the evidence is concerned on the aspect of earning and the quantum of compensation, it is not out of place to advert to the evidence of appellant/claimant herself who had stated on oath that prior to the accident she was an agriculturist, doing household work and also running a bar and thereby earning ₹6,000/-per month. She was unable to do anything after the accident, could not walk like a normal person, had developed swelling in her right leg and was unable to bend, squat, lift weight and was unable to do her household work.

5. There was a material suggestion that she has deposed falsely about her income but there was no rebuttal of her testimony that she was doing agricultural work apart from household work and running a bar. She had besides her testimony produced a bar license in her name which ought to have weighed with the learned Tribunal while assessing her evidence. The learned Presiding Officer of the Tribunal had examined the excise license produced by her authorising her to sell liquor but was swayed by the fact that the accident had occurred prior to that date and concluded that there was no documentary evidence to prove that she was earning ₹6000/-per month. The learned Tribunal totally ignored the evidence on record about her involvement in agriculture and

household work while hastily concluding so.

6. Besides the claimant had examined Bernardino, her husband as a witness who had corroborated her version that she was doing the household work, agricultural work and also running a bar in the name and style of 'Disco Bar' and she was unable to do anything on account of accident and there used to be swelling in her right leg. Besides she was unable to bend, squat, lift weight and could not walk like a normal person with no rebuttal of his testimony. Her witness Conceicao too had similarly stated that she was doing household work, was an agriculturist and running a bar but was unable to work now due to the accidental injuries and could not even walk like a normal person with no rebuttal to her testimony. Their evidence too was not considered by the learned Presiding Officer in its proper prospective while hastily concluding that her earning was the notional income of ₹3000/- per month. The Hon'ble Apex Court has held that the income for a housewife has to be considered at ₹4000/- per month. Besides the claimant was doing agriculturist work which was proved by her unrebutted testimony and all her witnesses which was not considered by the learned Presiding Officer. The earnings of the claimant even ignoring the fact that the excise license was subsequent to the date of accident had to be taken at a modest sum of ₹5000/- per month

if not more and which is accordingly considered to be her income.

7. **Raj Kumar** (supra), had suffered injuries in the vehicular accident in the nature of a fracture of both the bones of the left leg and left radius and was under treatment from 1.10.1991 to 16.6.1992. The Motor Accident Claims Tribunal awarded compensation of ₹94,700/- with interest at 9% per annum from the date of the petition till the date of realisation on the heads of ₹11000/-towards the medical expenses, conveyance and special diet; ₹3600/- towards the loss of earnings during the period of treatment; ₹25,000/- towards the pain and suffering and ₹55080/- towards the loss of the future earnings. Hence, he filed an appeal seeking an increase in the compensation which was rejected by the High Court on the ground that the disability certificate produced by him was not reliable and further challenged in the appeal by Special Leave where he put-forth two grievances: (i) the assessment of monthly income at ₹900/-(Rupees nine hundred only) was very low; and (ii) deduction of one third of the income towards the personal and living expenses while assessing the future loss of earning was not warranted. The questions that therefore arose for consideration of the Hon'ble Supreme Court were whether the principles adopted for assessing the compensation were erroneous and whether the compensation awarded was required to

be increased.

8. In **Raj Kumar**(supra), Their Lordships of the Apex Court while assessing the future loss of earning due to the permanent disability considered the ambit and scope of disability meaning the lack of ability to perform an activity in the manner considered normal for a human-being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which would cease to exist at the end of the period of treatment and recuperation. Permanent disability would either be partial or total. Partial permanent disability being a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he could be able to perform some of them and is still able to engage in some gainful activity.

9. In **Raj Kumar**(supra), Their Lordships observed that the total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result

of the accident. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb or part of the body expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of the left leg, it does not mean that the extent of the permanent disability with reference to the whole body is 140%. If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%.

10. In **Raj Kumar** (supra), Their Lordships further went on to observe that where a claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings 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. In most of the cases, the percentage of economic loss, i.e., the percentage of loss of earning capacity arising from a permanent disability would be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases particularly, the extent of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent of loss of earning capacity to the extent of the permanent disability would result in an award of either too low or too high a compensation. What is required to be assessed by the Tribunal therefore, is the effect of the permanent disability on the earning capacity of the injured and after assessing the loss of earning capacity in terms of the percentage of the income, it had to be quantified in terms of money, to arrive at the future loss of earnings. Therefore, Their Lordships observed that in some cases, on an appreciation of the evidence and the assessment, the Tribunal may find that the percentage of loss of the earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation.

11. In **Raj Kumar** (supra), Their Lordships therefore spelt out the guidelines in the matter of assessment of loss of earning capacity qua the extent of permanent disability holding that the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the Tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity and if the Tribunal concludes that there is permanent disability then it would proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity. The ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of

the permanent disability and what he could not do as a result of the permanent disability. The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the 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 on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

12. In **Raj Kumar**(supra), Their Lordships spelt out where in a case of left hand of a claimant was amputated, the permanent disability or functional disablement be around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be 100%, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in the government service, the loss of his left hand may not result in loss of the employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact,

there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in the government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

13. **Raj Kumar**(supra), held that the Tribunal should not be a silent spectator when the medical evidence is tendered in reference to the injuries on that in particular the extent of a permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to hold an enquiry into the claim for determining the just compensation. The Tribunal should, therefore take an active role to ascertain the true and correct position so that it can assess the 'just compensation'. While dealing with personal injury cases, the Tribunal should preferably equip itself with a Medical Dictionary and

a Handbook for evaluation of permanent physical impairment for understanding the medical evidence and assessing the physical and functional disability apart from keeping in view the first schedule to the Workmen's Compensation, 1923.

14. **Sarla Verma** (supra), held that the compensation awarded has to be just i.e. had to be fair and equitable, on the facts and circumstances of the case, to make the loss good suffered as a result of the wrong, as far as money can do so, by applying the well settled principles relating to the award of compensation. It held that it was not intended to be a bonanza, largesse or a source of profit and that assessment of compensation though involving certain hypothetical considerations should nevertheless be objective. Besides it spelt out the multiplier to be used in computing the compensation after discussing host of judgments earlier in point of time including **General Manager, Kerala State Road Transport Corporation v/s. Susamma Thomas** [1994(2) SCC 176] and **UPSRTC v/s. Trilok Chandra** [1996(4) SC C 362].

15. Shri S. S. Kakodkar, learned Advocate had no grievance whatsoever on the award of medical and transportation amount as also that on the service of the attendant and special diet awarded by the learned Tribunal but had a grievance about the quantum of

compensation awarded by the tribunal restricting to ₹60,000/-. The learned Tribunal had considered the fact that the claimant had suffered degloving injury of the right thigh and there was several limitations of the knee joint movement apart from the permanent disability to the extent of 40% as proved through the Orthopaedic Surgeon Dr. D'Mello. However while computing the extent of compensation, the learned Presiding Officer awarded a sum of only ₹60,000/- on the head of pain and sufferings. At one time the learned Presiding Officer disbelieved the case of the appellant that the excise licence to run the bar was subsequent to the date of accident and yet in the same breath held that she would face no difficulty to sit at a liquor bar and to conduct the business to hold that there would be no future loss of income.

16. The learned Presiding Officer of the Tribunal clearly overlooked the fact that she would not be able to do her work as an agriculturist which required bending, squatting etc. and held her entitled to the compensation of ₹60,000/-. Since i have earlier held her earning at ₹5000/- and considering the extent of the disability and adopting the multiplier of 9, she is held entitled to a reasonable compensation of ₹1,35,000/- restricting her disability to 25%. The total compensation therefore to which she would be entitled to works out to ₹1,74,025/-. The claimant had claimed the

compensation of ₹1,36,000/- and the amount now computed is in excess thereof and therefore she would be liable to pay the deficit Court fees on the amount so awarded in her favour.

17. In the result therefore, i pass the following:-

ORDER

The appeal is allowed whereby the impugned judgment and award is modified holding the appellant entitled to the compensation of ₹1,74,025/- with interest as awarded by the learned Tribunal. She shall however pay the deficit Court fees on the enhanced compensation. There shall be no order as to costs.

The Appeal stands disposed off accordingly.

NUTAN D. SARDESSAI, J.

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