

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.79 OF 2010

Sushil Jayant Nanodkar, Resident
of House No.C-11, Government
Quarters, Patto Colony, Panaji-
Goa.

... Appellant

Versus

1. Mr. Dnyaneshwar Vithoba Raut,
resident of House No. 21,
Agarwada, Pernem, Goa (Driver
of Truck GA-1-Z-2782).

2. Shri Maria A. Fernandes,
wife of Agnelo Fernandes,
resident of House No.820,
Vailo Wado, Morjim, Pernem-
Goa. (Owner of Truck).

3. National Insurance Company
Ltd., 2nd Floor, Confraria
Building, Jose Falcao Road,
Panaji-Goa (Insurance Company
of Owner of Truck).

... Respondents

Shri D.J. Pangam with Shri S.P. Munj, Advocates for
the Appellant.

Shri R.G. Ramani with Shri P. Kakodkar, Advocates
for Respondent No. 3.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 12th AUGUST, 2016

PRONOUNCED ON:- 22nd AUGUST, 2016

JUDGMENT:

This is an appeal challenging judgment and award dated 26.02.2010, passed by the Motor Accident Claims Tribunal (the Tribunal, for short) at Panaji in Claim Petition No. 48/2004. By the impugned judgment, the Tribunal has awarded compensation of Rs.25,000/- to the appellant/ claimant in respect of permanent partial disablement, resulting out of a vehicular accident.

2. The facts necessary for the disposal of the appeal may be stated thus:

On 22.01.2004, the appellant was proceeding from Panaji towards Bambolim on his motorcycle bearing no. GA-01-Y-1943. When he reached Santa Cruz, Merces Junction, a truck bearing no. GA-01-Z-2782 came from the opposite side and dashed against the motorcycle, as a result of which the appellant sustained grievous injuries. The appellant was treated in Goa Medical College Hospital (GMC) till

13.02.2004 and thereafter shifted to Jaslok Hospital, Bombay for specialised treatment. According to the appellant, he was required to undergo several surgeries and has suffered permanent disablement on account of injuries sustained in the accident. Further, according to the appellant, the accident occurred due to the rash and negligent driving of the truck by respondent no. 1. The respondent no. 2 is the owner of the truck. The truck was covered by a policy of insurance issued by the respondent no. 3 at the relevant time.

3. The respondent nos. 1 and 2 contested the petition by filing written statement (Exhibit-16). It was denied that the accident was caused due to rash and negligent driving of the respondent no. 1. It was claimed that the accident was a result of the rash and negligent driving of the appellant himself.

4. The respondent no. 3 filed its written statement (Exhibit-18). It was not disputed that the vehicle was covered by a policy of insurance for the period from 25.08.2003 to 24.08.2004. It was contended that the policy is governed by the terms and conditions as mentioned therein.

5. On the basis of the rival pleadings the tribunal raised the following issues:

Issues

1. Whether the claimant proves that on 22.1.2004 at about 9.15 hours at St. Cruz junction, the respondent no.1 drove truck bearing no.GA-01-Z-2783 in a rash and negligent manner and dashed against his motorcycle bearing no.GA-01-Y-1943 ?

2. Whether the claimant proves that as a result of the said accident, he sustained grievous injuries resulting in permanent disability ?

3. Whether the claimant proves that he is entitled for a total compensation of Rs.35,00,000/- ?

4. Whether respondents prove that the accident was caused solely due to the rash and negligent driving of the claimant himself?

The parties led oral and documentary evidence. The Tribunal answered issue nos. 1 and 2 in the affirmative, holding that the appellant had suffered grievous injuries, resulting in permanent disability, in the accident, which occurred due to the rash and negligent driving of the truck by the respondent no. 1. The Tribunal answered issue no. 4 in the negative thus, holding that the appellant was not responsible for the said accident. By a judgment and award dated 04.05.2006, the Tribunal partly allowed the petition granting compensation of Rs.27,00,000/- along with interest at the rate of 6% p.a. on the sum of Rs.5,28,209/-. This was inclusive of the compensation of Rs.25,000/- granted under Section 140 of the Motor Vehicles Act, 1988 (the Act, for short).

6. It appears that after the passing of the said award, the respondent no. 1 obtained information from Under Secretary Legislature

Department, Government of Goa, where the appellant was serving. It was informed by letter dated 15.09.2006 that the appellant had joined his duties w.e.f. 25.06.2006 and the appellant was drawing salary of Rs.18,534.00. It was further informed that the appellant, has been granted medical reimbursement of Rs.6,24,482/- and Rs.66,934/- towards air fare.

7. The respondent nos. 2 and 3 challenged the said award, before this Court, in First Appeal No. 263/2006, which was allowed to be withdrawn vide order dated 20.03.2007, with liberty to prosecute such remedy as may be available in law.

This led the respondent nos. 2 and 3 to approach the Tribunal by filing an application under Sections 151 and 152 of the Code of Civil Procedure (CPC), which was registered as Misc. Application No. 20/2007. The Tribunal by its order dated 14.02.2008 allowed the application, thereby recalling the award

dated 04.05.2006, directing the petition to be considered afresh. The said order was challenged by the appellant in Writ Petition No. 451/2008. However, the same was withdrawn on 11.08.2016.

8. In the meantime, the Tribunal re-heard the petition and by the impugned award has reduced the compensation to Rs.25,000/-, which is subject matter of challenge in this appeal.

9. I have heard Shri Pangam, the learned Counsel for the appellant and Shri R.G. Ramani, the learned Counsel for the respondent no. 3. None for the respondent nos. 1 and 2.

10. It is submitted by Shri Pangam, the learned Counsel for the appellant that the Tribunal erred in granting a meager compensation of Rs.25,000/-. It is submitted that under section 166 of the Act, the Tribunal is expected to decide 'just compensation'.

The learned Counsel has extensively referred to the evidence of the appellant, as also the medical evidence in order to submit that the appellant has suffered grievous injuries, resulting into 90% permanent partial disablement. The learned Counsel has submitted that the Tribunal ought to have allowed compensation under the head of pain and suffering, loss of amenities of life and towards the costs of securing an attendant. The learned Counsel submits that although, the appellant was sanctioned fully paid leave for the period of treatment, sizable amount of leave of the appellant has been washed off and the appellant would have been entitled to leave encashment as per Rules. The learned Counsel, therefore, submits that the appellant would also be entitled to compensation in lieu of such leave encashment. It is submitted that the Tribunal ought to have awarded some compensation towards cost of litigation. The learned Counsel has placed reliance on the decision, in the case of,

Sanjay Kumar V/s. Ashok Kumar & Another, (2014) 5 SCC 330; M.D. Jacob V/s. United India Insurance Limited & Another, (2014) 9 SCC 234; Dinesh Singh V/s. Bajaj Allianz General Insurance Company Limited & Another, (2014) 9 SCC 241; Kumari Kiran V/s. Sajjan Singh (2015) 1 SCC 539; Smt. Sarla Verma & Others V/s. Delhi Transport Corporation & Another, (2009) 6 SCC 121; and Seema Ganesgh Uikey V/s. State of Maharashtra & Others, 2005 (4) MhLj 559.

11. On the contrary, it is submitted by Shri Ramani, the learned Counsel for the respondent no. 3 that there is no present or future loss of earning capacity, as the appellant has joined his services and is earning his salary. The learned Counsel submits that the appellant received medical reimbursement of Rs.6,24,482/- and thus, no amount is admissible towards the actual cost of treatment. The learned Counsel submits that separate compensation cannot be claimed on account of leave

encashment, which would have been available to the appellant and towards cost of securing an attendant. It is submitted that the compensation under the head of pain and suffering and loss of amenities being part of general damages, there cannot be any specific measure of the same.

12. In a petition under Section 166 of the Act, the Claims Tribunal is expected to determine the amount of compensation, which appears to it, to be just. Thus, there is a duty cast on the Tribunal under Section 168 of the Act, to determine and award compensation, which appears to it, to be just in the facts and circumstances of the case. It is now well settled that in the exercise for determination and assessment of compensation, a reasonable guess work is necessary if, not inevitable.

We are presently concerned with a claim for compensation in respect of a personal injury, resulting into permanent disability. At the outset,

it is necessary to mention that the issue of negligence has not been agitated, at the instance of the respondent no. 3. Even otherwise, having regard to the limited defences available to the Insurance Company, particularly in the absence of any leave being granted under Section 170 of the Act (as the owner of the vehicle was a contesting party), the appellant cannot conceivably challenge the issue of negligence. Thus, the issue involved in the present appeal is essentially limited to the determination of the quantum of compensation.

13. It is necessary to mention that the Claims Tribunal has awarded a sum of Rs.25,000/- towards compensation for pain and suffering. Thus, no compensation has been granted under any other head. A perusal of the judgment and award passed by the Tribunal, would go to show that, what weighed with the Tribunal is that the appellant had suppressed certain material facts and had "snatched the award of compensation", without disclosing the fact that

he was paid the amount of salary. This may not be entirely correct because the claimant joined service on 26.06.2006, after passing of the initial award on 04.05.2006. That apart, in a claims petition, the conduct of the claimant may not be as relevant and significant as in a case where, grant of equitable relief is being considered. To put it otherwise, the conduct of the party may assume significance and in a given case, may even disentitle the party from any equitable relief on the basis of the conduct, which would indicate suppression or non disclosure of material facts. This is not to suggest that such conduct of the claimant would be wholly irrelevant, in a claim petition. It is necessary to emphasise that such conduct, may not deter the Tribunal from exercising its statutory duty under Section 168 of the Act in determining the amount of just compensation.

14. In the present case, prior to passing of the award dated 04.05.2006, the appellant had examined himself alongwith Pradeep Karekar (CW-2), Bhupesh Shah (CW-3), Harishchandra Sawant (CW-4), Dr. Zelio D'Melo (CW-5), Farid Veljee (CW-6) and Pravin Gadekar (CW-7). The said award was recalled on 14.02.2008 and the claim petition was heard afresh. At that stage, the appellant was recalled and was re-examined on 17.11.2009. On behalf of the respondent-Insurance Company, one Lourence Fernandes was examined as RW-1, while Pradeep Karekar, who is an Accounts Officer, was recalled and was examined as RW-2. Before proceeding to consider the evidence, it would be worthwhile to refer to certain decisions, which were cited at the Bar.

15. The Hon'ble Supreme Court, in the case of **General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas & Another, AIR 1994 SC 1631**, has laid down the broad

principles, under which the Court should determine the damages, which are as under:

"The determination of the quantum of compensation must answer what contemporary society "would deem to be a fair sum such as would allow the wrongdoer to hold up his head among his neighbors and say with their approval that he has done the fair thing". The amount awarded must not be niggardly since the "law values life and limb in a free society in generous scales". All this means that the sum awarded must be fair and reasonable by accepted legal standards."

16. In the case of **Raj Kumar Vs. Ajay Kumar, (2011) 1 SCC 343**, it has been held thus, in paragraphs 6 and 7 of the judgment:

"6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii) (a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii) (b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

7. Assessment of pecuniary damages under item (i) and under item (ii) (a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses-item (iii)-depends upon specific medical evidence regarding need for further treatment and cost thereof.

Assessment of non-pecuniary damages-items (iv), (v) and (vi)-involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decision of this Court and the High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability-item (ii)(a)."

Thus in a routine personal injury case, compensation would be awarded only under heads (i), (ii)(a) and (iv) and it is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant that the compensation can be granted under any of the heads (ii)(b), (iii), (v) and (vi). The said judgment has been relied upon in the subsequent decision of the

Supreme Court in the case of **Sanjay Kumar** (supra).

17. Let us now consider the evidence in relation to the individual heads as above.

18. Before going to the evidence, it is necessary to mention that the appellant has neither set out any details of various heads under which the compensation is claimed in the claim petition nor in the appeal memo. During the course of the arguments at the Bar, the learned Counsel for the appellant claimed that the compensation may be granted under the following heads:

Pain and Suffering	: Rs. 1,50,000
Loss of Amenities	: Rs. 3,00,000
Cost of Litigation	: Rs. 25,000
Leave Encashment	: Rs. 1,20,000
Attendant Charges	: Rs. 1,70,000

The appellant is working as a Marathi Correspondent in the State Legislature Secretariat.

19. Insofar as the expenses relating to treatment, hospitalisation and transportation are concerned, it has come in the evidence of the appellant that he has received medical reimbursement to the extent of Rs.6,00,000/-, which includes the travelling expenditure (para 23 of the affidavit in evidence dated 17.11.2009). It has come in the evidence of Pradeep Karekar (CW-2) that there is no upper limit of medical reimbursement and the claimant will get the entire medical expenses reimbursed. The appellant has also received the air fare. It can thus be seen that the appellant has received the medical reimbursement and there is evidence to show that there is no upper limit to such reimbursement. In that view of the matter, no compensation would be admissible under clause (i) relating to treatment, hospitalisation and transportation.

20. Insofar as nourishing food and miscellaneous expenses are concerned, there is no clear claim made out and supported by any evidence.

21. This takes us to the head of loss of earnings. Insofar as the loss of earnings during the treatment, is concerned, it is the evidence of Pradeep Karekar (CW-2), that an amount of Rs.1,39,129/- was paid to the appellant in lump sum as salary from August, 2004 to 24.10.2005 in cash on 03.11.2005. It is thus clear that there is no actual or future loss of earnings. This is because, the appellant was earning monthly salary of Rs.15,605/- at the time of the accident, while the salary in November, 2009 was stated to be Rs.36,000/-, which has come in the cross examination of the appellant. Insofar as the head of future medical expenses is concerned, as noticed earlier, there is evidence of Pradeep Karekar that the medical reimbursement is permissible without any

limit. If that be so, it is not possible to consider grant of compensation under this head. Thus, I find that insofar as pecuniary damages are concerned, the appellant may not be entitled to any compensation.

22. This takes us to the non pecuniary damages. The non pecuniary damages, which are the general damages, involve determination of a lump sum amount, in the context of the circumstances such as age, nature of injury, deprivation and disability suffered by the claimant and the effect thereof on the future life of the claimant (see the case of **Raj Kumar** (supra)). It has come in the evidence of the appellant that he was aged 42 years on the date of the accident and has suffered 90% permanent disability. He has stated that he has difficulty in moving about and in attending to his daily chores. He stated that he is only able to speak, but not without difficulty and needs somebody's help. He

stated that his entire right upper and lower limb is paralyzed and has no sensation in the same. He was not able to put his signature on the affidavit in evidence and therefore, has put his left hand thumb impression on the same. The evidence of the appellant on the aspect of his disability has not been dislodged in the cross examination.

23. We then have the evidence of Dr. Zelio D'Melo (CW-5). He states that he examined the appellant on 22.01.2004 and noticed the following injuries:

- (1) Compound fracture of the right femur.
- (2) Closed fracture of the right humerus with fracture of the second, third and fourth metacarpal of right hand and fractured lower end of radius.
- (3) Fracture of the right patella.
- (4) Fracture of the left clavicle with head injury.
- (5) Bronchial plexus injury of the

right upper limb.

He states that the percentage of permanent disability was assessed on 30.11.2004 and according to the 'Alimco Scale', it is 90% for the right upper limb due to physiological loss of function and for the right lower limb, it is 50% due to stiffness of the right joint knee. This witness has issued a certificate (Exhibit-46/A), which mentions the following multiple injuries:

- (1) Compound comminuted fracture right femur with bone loss.
- (2) Fracture right patella.
- (3) Comminuted fracture lower and right radius.
- (4) Closed midshaft fracture right humerus.
- (5) Closed fracture base of 2nd, 3rd, 4th metacarpal right hand.
- (6) Brachial plexus injury(R) upper limb.
- (7) Closed fracture base of coracoid with closed fracture lateral and left clavicle.

There is another medical certificate (Exhibit-43) on record, which shows that there is a six inch bone loss in a badly comminuted fracture femur and a shattered patella with a large wound on the anterior aspect of his thigh. It further states that there is a bronchial plexus injury and a plated fracture humerus and a badly comminuted fracture lower end radius ulna. It further shows that to salvage the right lower limb, he will need a vigorous treatment regime with multiple specialised surgeries to get back the length and compensate for the bone loss. However, the chances that his knee could be salvaged are remote.

It can thus be seen that the appellant has suffered 90% permanent disability of the right upper limb and 50% of the right lower limb and it is not hard to imagine that the appellant must have undergone severe pain and suffering and must be encountering difficulty in attending to his daily chores.

24. Thus, in my considered view, the grant of Rs.25,000/- towards damages for pain, suffering and trauma, would be quite inadequate. I find that an amount of Rs.1,00,000/- towards compensation for pain and suffering and another Rs.1,50,000/- towards compensation for loss of amenities of life, would meet the ends of justice. Insofar as the loss of expectation of life (shortening of normal longevity) is concerned, there is neither any evidence nor any claim made.

Insofar as the claim against the necessity for securing an attendant is concerned, again there is no evidence to show that any such attendant was engaged or that some expenses were incurred for the help obtained by the appellant. Insofar as leave encashment is concerned, again the appellant could have brought some evidence on record, as to what amount of leave encashment is permissible and the monetary equivalent of the encashment, which is

admissible. The appellant had examined the Accounts Officer (CW-2), who was again examined as RW-2 after the initial award was recalled. He would have been the best witness to state about the leave encashment, which is permissible. Thus, in the given facts, I do not find it necessary, to consider the question whether, compensation can be claimed or granted under any such head, because even assuming that compensation can be granted, there is no evidence to assess the same.

25. Insofar as the cost of litigation, I am inclined to grant Rs.25,000/- towards cost of litigation (see the case of **Sanjay Kumar** (supra)).

26. Thus, the total compensation would be as under:

Compensation for Pain and Suffering	: Rs. 1,00,000
Compensation for Loss of Amenities	: Rs. 1,50,000
Towards Cost of Litigation	: Rs. 25,000
Total Compensation	: Rs. 2,75,000

The amount of compensation would carry interest at the rate of 9% per annum from the date of the petition till the date of payment. This shall be inclusive of the amount if any, paid under Section 140 of the Act.

27. In the result, the following order is passed:

ORDER

(a) The appeal is partly allowed.

(b) The impugned judgment and order dated 26.02.2010, is hereby modified.

(c) The respondents are held jointly and severally liable to pay the amount of Rs.2,75,000/- to the appellant, with interest at the rate of 9% per annum, from the date of the petition till realisation.

(d) The aforesaid amount shall be inclusive of the amount if any, paid under Section 140 of the Act.

(e) Award be drawn accordingly.

(f) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

NH/EV