

IN THE HIGH COURT OF BOMBAY AT GOA

First Appeal No. 28 of 2015

Uday Shrirang Naik,
41 years, service,
House No.75,
Ambirna Socorro,
Bardez-Goa.

..... Appellant

V/s.

- 1 Smt. Sunita Suryakant Nagvekar
Widow of the deceased Suryakant
Nagesh Narvekar, Major in age, R/o.
Flat F-1 Udayan Apartments,
Bhatkarwada, Porvorim Bazar,
Porvorim -Bardez, Goa.
- 2 National Insurance Co.Ltd.
Vaman Smriti, Near Laximi Narayan
Temple, Mapusa, Bardez- Goa. Respondents.

Mr. E. Afonso, Advocate for the Appellant.

Mr. G. Nagvenkar, Advocate for the respondent no.1.

Mr. U.R. Timble with Mr. Viraj Timble, Advocates for the
respondent no.2.

Coram :- SMT. M. S. JAWALKAR,J.

Reserved on : 6th November, 2020

Pronounced on: 26th November, 2020

JUDGMENT

Present appeal is filed by the appellant being aggrieved by the Judgment and Award in Claim Petition No.75 of 2004 dated 28/11/2014. The appeal is filed for quashing and setting aside the judgment of the Claim's Tribunal and for grant of compensation.

2. The Claimant's claim before the Claim Tribunal was as under :

That on 21/10/2003 at 16.55 hours at Porvorim, the claimant was riding his motorcycle and proceedings from Gauri Petrol Pump towards Mapusa and the accident occurred near Tin building, near Gauri Petrol Pump, Alto Porvorim, on the Panaji-Mapusa road. The case was registered under Motor Vehicles Accident No.111 of 2003 and Crime no.122 of 2003. Due to the impact of the accident, the claimant sustained fracture injuries and loss of teeth. The Bajaj Chetak Scooter bearing No.GDN-3818 of Suryakant Nagvenkar was involved in the accident. The said scooter of the deceased Suryakant Nagvenkar came from the opposite direction and on the no

entry road and dashed against his motorcycle. He was working as a driver at MPT at Vasco and earning ₹10,534/- per month and had claimed the compensation of ₹3,00,000/-.

3. It is a matter of record that in the said accident the person riding scooter died and his wife also filed a Claim Petition bearing No.10/2004. It is also a matter of record that there was earlier Judgment came to be passed on 19/10/2006 whereby the Claim Petition of the present petitioner was rejected. There was appeal carried out by the claimant bearing no.255 of 2007 before the High Court which came to be disposed of. By this Judgment the earlier judgment of the Tribunal was quashed and set aside and the Tribunal was directed to dispose of the Claim Petition on its own merits after hearing the parties in accordance with law. The parties were also given liberty to adduce further evidence.

4. It is contention of the learned Counsel Shri Afonso for the appellant that the present Judgment is infact replica of earlier Judgment which was set aside. In the First Appeal No.255 of 2007 this Court has specifically held that the

settlement by the appellant's Insurance Company with respondent no.1 in the Claim Petition filed by the respondent No.1 has no effect on the claim of the petitioner/appellant. Therefore, no question of estoppel arise against the appellant due to a settlement between the Insurance Company of the appellant and the respondent No.1 in Claim Petition No.10/2004 arrived at in the Lok Adalat.

5. It is further contended by the learned Counsel for the appellant that merely filing of chargesheet is not sufficient to establish rashness and negligence on the part of claimant specifically when he was acquitted from the criminal charges and even in criminal proceedings no eye witness was examined to establish his rashness and negligence. The prosecution examined only wife of the deceased who has admitted that she has not witnessed the accident. Filing of chargesheet cannot be the basis of proof of rashness and negligence specifically when other evidence is on record. Most important fact is that the claimant herein was not party to the settlement between the Insurance Company of the appellant and respondent No.1. Due to settlement he could not get any

opportunity to prove rashness and negligence of the deceased nor his innocence. In view thereof, the learned Tribunal after remand ought to have appreciated evidence afresh. After remand also the respondent No.1 examined herself who was not the eye witness. In such circumstances, there is total failure on the part of learned Tribunal in appreciating evidence on record. Evidence of Aw7 was discarded on the ground that he is not reliable. But if the total evidence on record is appreciated the claimant himself was the eyewitness of the accident and in his cross also nothing supporting to the respondent brought on record.

6. The learned Counsel for the respondent no.1 adopted arguments advanced by the learned Counsel for respondent no.2.

7. It is the contention of Counsel for the respondents that mere exhibition of documents i.e. Panchanama, Sketch or disability certificate cannot be said that contents were proved. So far as sketch is concerned author of the said sketch was not examined. Similarly, disability certificate showing 22.5%

disability is not examined.

8. Learned Counsel for the respondent Shri Timble relied on **Mr. Pukhraj Bumb v/s. Mr. Jagannath Achut Naik and others**[2013(6) ALL MR 128] in support of their contention that mere marking of exhibit to the document will not by itself admission of contents in the document. Rashness and negligence is required to be proved by the claimant. In the above citation this Court held that a person cannot automatically become entitle to compensation on the ground that accident was taken place. It is well settled that proof of negligence of the driver of the vehicle is necessary before the owner of insurer of that vehicle is held liable for payment of compensation. This Court also relied on **Narmada Devi Gupta v/s. Birendra Kumar Jaiswal and another** (2004(5) ALL MR 51(SC) wherein Apex Court held that mere production and marking of a document as a Exhibit is not enough. It has been held that execution of the said document has to be proved by admissible evidence. The proof of its execution does not invest the document with any probative or evidentiary value if otherwise it has none. A proof of

document is something which is independent from the evidentiary value of the documents. Moreover, by consent, proof of the document may be dispensed with, but if the document is intrinsically inadmissible in evidence no amount of consent by any party can confer status of admissibility upon the said document.

9. The learned Counsel also relied on **Sudhir Bhuiya v/s. National Insurance Company Ltd.** [2005 ACJ 509 Calcutta High Court] in support of their contention that it is settled law that if a document is marked exhibit on consent without reservation, the contents are not only evidence but are taken as admitted the result being, the contents cannot be challenged either by way of cross-examination or otherwise.

10. It is further contention of the respondents that as chargesheet is filed against the claimant it is proof of rashness and negligence. At the most it can be said that there was contributory negligence.

11. The learned Counsel for the appellant Shri E. Afonso relied on **Sayed Sadiq and others v/s. Divisional Manager United Insurance Company Ltd.** [2014) 2 SCC 735] in support of his contention that in absence of any evidence to prove contributory negligence by the appellant they cannot be fasten with such liability. Hon'ble Apex Court in the above citation held that the Tribunal as well as High Court erred in holding that the spot of accident is in the middle of the road and the claimants were moving on the middle of the road which led to the accident and hold claimants contribution to the accident to the extent of 25%. Conclusion of the Tribunal only basis of the fact that the accident took place in the middle of the road in the absence of any evidence to prove the same. The finding regarding contributory negligence which has been upheld by the High Court was set aside.

12. Another contention of the Counsel for the respondents is that there is no reference of eyewitness in the complaint and he was examined at belated stage. His statement is also not recorded by the police and therefore his

testimony cannot be believed.

13. In reply, the learned Counsel for the appellant relied on **Dulcina Fernandes and others v/s. Joaquim Xavier Cruz and another** [(2013) 10 SCC 646] the Hon'ble Apex Court in the said matter while setting aside the order passed by learned Tribunal held that "while it is correct that the pillion rider could have been unfolded the details of the accident what cannot be lost sight of is the fact that while the accident occurred on 29/06/1997 and the evidence before the Tribunal was recorded after seven years i.e. in the year 2004. Keeping in view the nature of the jurisdiction i.e. exercised by the Claim Tribunal under the Act we do not think it was correct on the part of the learned Tribunal to hold against the claimants for their failure or inability to examine the pillion rider- Razario Antao as a witness in the case. Taking into account the hapless condition in which the claimant must have been placed after the death of their sole bread winner and sufficiently long period of time that have elapsed in the meantime, the learned Tribunal should not have treated the non examination of the pillion rider as a fatal and fundamental

law the claim made before it by the appellant. In the said matter the Hon'ble Apex Court held that Supreme Court while hearing appeal with special leave would not normally re appreciate evidence laid before the trial Court. Supreme Court refraining from re-appreciating evidence in the said case too, but observing that rejection of evidence of eyewitnesses on the grounds assigned was improper. It is also held that though it is undisputed that pillion rider could have been unfolded details of accident but it also need to be noted that evidence was recorded before tribunal after seven years of occurrence. Tribunal should not treated non-examination of pillion rider as fatal to the claim made before it by the Appellant.

14. Learned Counsel for the appellant relied on **Mangala Ram v/s. Oriental Insurance Company Limited and other** [(2018) 5 SCC 656] in support of his contention that the nature of proof require to establish culpable rashness, punishable under IPC is more stringent than negligence sufficient under law of tort to create liability. It is held by the Apex Court by referring judgment in the NKV Brother (Pvt)

Ltd. V/s. Karumai Ammal. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes.

15. Learned Counsel for the appellant also relied on **Bimala Devi and other v/s. Himachal Road Transport Corporation and others** [(2009)13 SCC 530] wherein Hon'ble Apex Court held that while dealing with the claim petitions in terms of Section 166 of the Motor Vehicles Act, 1988 a Tribunal *stricto sensu* is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of

preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied.

16. The Claim Petition is of 2004 and it is a matter of record that initially claim petition was rejected by the Tribunal on the ground that claimant failed to prove rashness and negligence and as another claim petition filed by wife of deceased was settled by the insurance company of the vehicle owned by the present claimant that means liability is accepted by the insurance company. The said judgment and award was challenged before this High Court vide First Appeal no.255/2007. This Court set aside the impugned judgment and award of the learned Tribunal and directed to dispose of the claim petition on its merit after hearing the parties in accordance with law and all the contentions of the parties were left open. In the said petition, this Court finally decided the controversy and held that appellant/claimant cannot be estopped because insurance company of appellant and the respondent no. 1 who is claimant in another claim petition bearing No. 10/2004 settled the matter in Lok Adalat. This cannot be a ground to reject the claim petition filed by a

person who claims to be a victim of a motor accident. It was further observed that in the present matter case of the appellant that the accident occurred due to the rashness and negligence on the part of the husband of respondent no.1. This would have to be examined by the Claim's Tribunal after appreciating the evidence on record. After remand, it appears that the respondent no.1 examined herself. Admittedly, she was not the eye witness of the accident and she has admitted that she has not seen the accident personally. No any other witness is examined by the respondent.

17. The learned Tribunal raised doubt about trustworthiness of AW7 who is examined as the eye witness before remand itself. On perusal of both the orders i.e. before and after remand, it appears that in both the orders similar view expressed about evidence of AW7 that he is not reliable. The main emphasis of the Counsel for respondent is that Pw-7 alleged eyewitness has not given his statement to the police. However, in his deposition it has come that after the accident both the persons were taken in an ambulance which was at the petrol pump and police did not arrive till he left the said

place. As observed by the Hon'ble Apex Court, in **Dulcina Fernandes** (supra), Taking into account the hapless condition in which the claimant must have been placed and sufficiently long period of time that has lapsed in the mean time, the learned Tribunal should not have treated the non examination of the pillion rider as a fatal and fundamental law the claim made before it by the appellant.

18. It is a matter of record that the claimant herein was acquitted in the criminal matter. From the judgments cited by Counsel for the respondents, it is also clear that filing of FIR is a prima facie proof of rashness and negligence. Acquittal in the said matters may not entitle claimant to claim compensation. However, if there is sufficient proof on record, Claim's Tribunal may not base its judgment on any criminal proceedings as evidence required in criminal matter is different than the evidence required in claim petitions. In criminal matters evidence is required to prove facts beyond reasonable doubts as held in **Mangalaram**(supra) whereas in claim petition, it has to be on the touch stone of

preponderance of probabilities.

19. In the judgment of JMFC, at Mapusa in Criminal Case no. 374/S/2003/C at para 22 and 24 the finding was recorded as under:-

"22. P.w.8, Vilas Fadte, is the Investigating Officer, who has conducted the investigation. The Investigating Officer has deposed that there were no other persons present in the houses nearby and that the attendants at the petrol pump refused to act as panchas. He has also deposed that they were filling petrol at the petrol pump. P.w.8 Vilas also admits that the motor cycle was facing towards Mapusa side and the scooter was facing wrong side, as one proceeds from Panaji to Mapusa. The Investigating Officer has also deposed that the show of the scooter was totally damaged and there were damages to the brake lever of the motor cycle. There were no scratch marks on the road of the scooter being dragged. He has also deposed that the motor cycle rider was shifted prior to his arrival and that there were no eye witnesses present at the spot. He has also deposed that nobody showed him the spot of the impact and that the sketch was

drawn of the vehicles, which were fallen on the road.

23.....

24. Hence, from the evidence produced on record, it is clear that none of the witnesses examined by the prosecution had witnessed the incident, as to how the accident occurred. Besides, from the deposition of the pancha witness and also P.w.8, Vilas Fadte, the scooter was facing wrong side, which was of the deceased. Merely on the basis of the scene of offence panchanama and the damages to the vehicles, as deposed by the panchas and the Motor Vehicle Inspector, it cannot be concluded that the accused was driving the vehicle in a rash and negligent manner. Further, in the absence of any evidence produced by the prosecution to show that the accused was rash and negligent, merely because there is a death in the present case.

20. Thus it is seen that there was not a single eye witness examined by the prosecution to prove rashness and negligence of present appellant in the said matter nor any

evidence led by the prosecution. As against this, claimant himself is the eye witness of the accident. From the sketch and deposition of pancha witness it is clear that motor cycle was lying facing towards Mapusa and scooter lying facing towards Panaji. Claimant's contention was that after filling petrol on Gauri Petrol Pump and after travelling for a distance of 10 to 12 mts. On the said Panaji to Mapusa road the scooter bearing no.GDN 3818 driven by Suryakant Narvekar, suddenly came out of the compound of Dhumatkar Building to proceed towards said petrol pump and dashed against him. He fell on the heap of rubble stones by the side of the road and was seriously injured. Admittedly, it is one way from Panaji to Mapusa and the scooterist came from the opposite direction i.e. on wrong side. There is no dispute that it is a one way from Panaji to Mapusa. There was suggestion to this claimant that he was coming from Housing Board towards Gauri Petrol Pump on the wrong side of one way road and that he dashed against the scooter driven by the deceased. However, if that would be the case, the impact of accident would not be as shown in the sketch. Though there is no building by name Dhumatkar building near Gauri Petrol Pump

as admitted by the claimant, however it is made clear by him that Advocate Dhumatkar's residence was in the said building. Even the sketch drawn by the police person also shows building by name Dhumatkar Building adjacent to Gauri Petrol Pump. If claimant would have coming from the wrong side, his vehicle would be lying towards Panaji side and scooter towards Mapusa side.

21. The learned Counsel for the respondents relied on **Jiju Kuruvila and other v/s. Kunjamma Mohan and others** [(2013) 9 SCC 166] in support of their contention that on the basis of position of vehicle one cannot decide the negligence. Hon'ble Apex Court in the above citation held that

"24. The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction etc. depends on number of factors like speed of vehicles, intensity of collision, reason for collision, place at which

one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident caused, but in absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual."

22. Though one cannot from the sketch or from the position of vehicles decide the rashness and negligence of the vehicles, but considering the fact and evidence of claimant himself, what is stated by him, appears to be probable. Only because in the said accident scooterist died, chargesheet was filed against the motor cyclist i.e. the claimant otherwise there is no evidence against the appellant. The respondent failed to bring any contrary evidence or any evidence rebutting the contention of the claimant. Respondent No.1 relied on the same police papers in her Claim Petition. Therefore, there is no substance in the contention that sketch and Panchanama were not duly proved.

23. It is the contention of the learned Counsel for the respondent that filing of chargesheet itself is proof of rashness and negligence on the part of the claimant.

24. The learned Counsel for the respondents also relied on **Dulcina Fernandes and others v/s. Joquim Xavier Cruz and another** [(2013) 10 SCC 646] in support of his contention that even if the person against whom chargesheet was filed and was sent for trial it is prima facie proof of his negligence. Even if he is acquitted what cannot be overlooked is the fact that upon investigation of the case registered against the driver prima facie material showing negligence were found to put him on trial.

25. However, with the evidence on record, I am not in agreement with the learned Counsel for the respondent. In the matter of **Dulcina Fernandes**(supra) it was a death claim. Here the claimant himself is the eyewitness. If evidence of A.w.7 is perused, he deposed that on that day, he saw the applicant riding a Splender motor cycle and he came on the main road from the petrol pump and at that time one

scooter came from the building side next to the petrol pump towards the main road, and gave dash to the motor cycle and at that time he was at a distance of 25 mts. behind. The said road by the side of the petrol pump is the part of the National Highway and the said portion is the one way to proceed from Panaji to Mapusa. Both the riders sustained injuries and both were unconscious. Since the ambulance was found at the petrol pump, both the injured were shifted from the spot. His statement was not recorded by the police.

26. In cross-examination he deposed that he himself had not disclosed to the police that he saw the accident. Police did not arrive on the spot till he was present. Thereafter he left the spot. This witness denied other suggestions and deposed that ambulance driver was residing near his house and as claimant came to know that he had seen the accident he requested him to depose in his claim petition.

27. The learned Tribunal on earlier occassion also disbelieved his evidence of Aw-7 and after remand also the same view was expressed by the Tribunal in respect of this

witness. In my considered opinion, the claimant himself is the eye witness of the said accident. His evidence if seen alongwith the sketch and panchanama his contention appears to be probable. There is no evidence at all in rebuttal except the suggestions. In fact, there was no reason to disbelieve the testimony of eye witness also and his evidence is sufficiently supporting the evidence of claimant. Only thing is that his presence revealed to the claimant belatedly. Non disclosure by him to the police is not at all surprising because he was running his taxi. He was there for some time and he has seen both the persons shifted in ambulance, till his presence no police arrived at that spot and it is common experience that people are reluctant to go by themselves to the police station to give their statement specifically when it is their earning time. Even if his evidence of Aw-7 is not taken into account, still other evidence on record clearly goes to show that the deceased was coming from wrong side of one way road. If he would be on his right side he would be proceeding from Panaji to Mapusa. The dash would be from the backside of his scooter. However, from the panchanama of scene if perused, there is damage to the front side. Scooter is lying towards

Panaji and motor cycle is lying towards Mapusa side.

28. As per the claimant, at the time of accident he was after filling petrol at Gauri Petrol Pump was proceeding to Socorro at his residence. Admittedly, his address is shown at Socorro which is towards Mapusa side. It also appears that claimant has made every effort to avoid accident as brakes of the vehicle of the claimant appears to be broken. In fact, there is nothing on record on what basis the FIR was filed against the claimant. It is clear from the evidence of I.O. that there was no evidence at all. It is also contended by the learned Counsel for the respondent that the claimant has not challenged the filing of FIR. However, that cannot be the reason to deny claim of the petitioner.

29. Thus claimant has sufficiently proved that the husband of respondent no.1 was rash and negligent in driving his scooter and caused the accident. The learned Tribunal has not decided the issue of quantum of compensation. The learned Tribunal totally erred in answering issue no.2 without there being any evidence on record that the respondent

proved that the claimant was rash and negligent in driving the motorcycle. In fact there is no evidence to prove this fact. As against issue No.3, i.e. claimant's claim of compensation, it was held that as the claimant failed to prove that the accident took place due to the negligent driving of the scooter rider, claimant is not entitled for any compensation from the respondent and accordingly the said issue was answered in the negative.

30. The learned Counsel for the appellant relied on judgment of this Court in **Shri Peter Godinho (since deceased) through LRS v/s. Shri Cornelist and others** [First Appeal No. 19 of 2007 dated 10/09/2018] in support of his contention that the Tribunal ought to have decide all the issues. This Court relied on **Bimlesh and others v/s. New India Assurance Co. Ltd** 2010 10 SCC 591 wherein the Hon'ble Apex court held that

"9. The inquiry under Section 168 and the summary procedure that the Claims Tribunal has to follow do not contemplate the controversy arising out of claim application

being decided in piecemeal. The Claims Tribunal is required to dispose of all issues one way or the other in one go while deciding the claim application. The objection raised by the Insurance Company about maintainability of claim petition is intricately connected with its liability which in the facts and circumstances of the case is dependent on determination of the effect of the additional premium paid by the insured to cover the risk of the driver and other terms of the policy including terms of the policy contained in para 5. Since all issues (points for determination) are required to be considered by the Claims Tribunal together in light of the evidence that may be let in by the parties and not in piecemeal, we do not think it proper to consider the rival contentions on merits at this stage. Suffice it to say that matter needs to be sent back to the Claims Tribunal."

31. Similarly, by giving reference in **Remediana Braganza E Rebello and others v/s. Laxman Kolekar and others** First Appeal No.15/2009 decided on 04/07/2014 in similar circumstances has remanded the matter back to the Tribunal to decide it afresh in accordance with law.

32. As this matter was remanded earlier also for fresh hearing and accident was of the year 2003, and both the parties sufficiently laid their evidence on amount of compensation as well as advanced arguments in appeal on the amount of compensation, in my considered opinion it would not be appropriate to remand the matter again to the learned Tribunal. Accordingly, I am inclined to decide the amount of compensation as well.

33. It has come in the evidence of the claimant that on that day after the accident he was taken to GMC, Bambolim by ambulance which was available at the Gauri petrol pump. He was operated in the hospital and his mouth thereafter was completely sutured under local anesthesia. He was discharged from the hospital after seven days with his mouth completely closed and sutured which remained closed for 64 days. During that period he was given only liquid diet by straw through a gap in his denture. His last visit for follow up to GMC Bambolim was on 19.07.2005 and his next appointment was on 05.09.2005.

34. On 16.05.2005, the plate fixed in his mouth was removed. Another surgery was required to be done as while removing the screws, some broke. On 02.06.2005 after removal of sutures he was referred to the department of Dentistry. He lost teeth in the accident and he suffered permanent facial disfigurement and scars. He claimed amount of Rs.3,920/- (280 x 14 for taxi) in addition Rs.700/- towards petrol for remaining visits on motor cycle to the hospital. He also claimed amount of Rs.1879/- on medicines and Rs.15,000/- on attendant and special diet. At the time of accident he was employed at Mormugao Port Trust as Port Lift driver and his salary was Rs.10,534/-. Due to accident he suffered loss of his leave during his treatment period and also suffered permanent disability and there was loss of his working capacity as well as his future prospects. There is nothing adverse to the claimant in respect of his salary and job as brought on record by the respondent.

35. Claimant has examined A.w.2, Dr. S. N. Nadkarni. As per his certificate disability was shown as zero percent as fracture of the mandible was seen united and there is full

functional recovery. Claimant also examined A.w.3., Damodar Pai, Accounts Officer and established his salary as Rs.10,534/- per month. Claimant also examined A.w.4, one Sadanand Palkar, to prove taxi bills (exbt. 35 colly). Claimant also examined A.w.5, Nitesh Madkaikar, Pancha witness. He proved the panchanama and sketch. He deposed that as per the sketch vehicles were lying on the spot. Claimant also examined A.w.6 Dr. Francisco Akkara. He deposed that the certificate is signed by Dr. Subha Hegde. He identified her signature at exbt. 46. He deposed that she is not working in the dental college Bambolim at the time when he deposed in this case. There was no cross-examination of this witness. As per the said certificate the percentage of permanent disability as per the guideline for evaluations of physical impairment in facial injuries prescribed by the expert group meeting on disability evaluation and dissemination (DGHS-MHO) AINS/New Delhi 1981 is determined as 22.5% (Twenty-Two point five percent). The said certificate is dated 10.03.2005. It is contention of Learned Counsel Shri Timble for the respondent that the doctor issuing certificate Exh-46 has not been examined and therefore it has no evidentiary value.

Moreover, disability is of particular organ and not of whole body.

36. The learned Counsel for the respondents also relied on **Raj Kumar v/s. Ajay Kumar and another** [(2011)1 SCC 343] wherein general principles relating to compensations in injury cases are laid down. The heads under which compensation can be awarded is pecuniary damages and non pecuniary damages. While granting compensation, the court or tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. The percentage of permanent disability is expressed by the doctor with the reference to the whole body, or more often than not, with reference to a particular limb and accordingly percentage of permanent disability is to be reduced if it is in respect of particular limb. The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity.

37. The learned Counsel Shri Timble also relied on **Rajesh Kumar @ Raju v/s. Yudhvir Singh and another** [2008 ACJ 213] wherein disability was shown as 60%. The said certificate was obtained after two years. It was also not known whether the Civil Surgeon of the hospital who checked the appellant issued the certificate. On what basis the said certificate was issued two years after the accident took place is not known. Author of the said Certificate had not been examined. Unless the author of the certificate examine himself it was not identified in the evidence. Whether the disability at 60% was calculated on the basis of provisions of the Workman's Compensation Act or otherwise is not known. In view the Apex Court refused to apply Workman's Compensation Act in the said matter.

38. **From these two certificates i.e. dated 24.02.2005 and 10.03.2005,** one is issued by Department of Orthopedic surgery GMC and one is issued by Department of Oral and Maxillo facial Surgery, Goa Dental College and Hospital that so far as disability in respect of fracture to his left fourth metacarpal and fracture of mandible was managed

by Ortho Department and the fracture was healed the disability shown as zero percent. Whereas certificate issued by Department of Oral and Maxillo facial Surgery, Goa Dental College and Hospital it is 22.5%. The said percentage is in respect of physical impairment in facial injuries. It cannot be equated with total disability of the body. Moreover, there is no mention of any functional disability.

39. However, one cannot ignore the fact that the claimant will require to suffer for this injuries for his life time. Therefore, in my considered opinion the claimant is entitled to be compensated with loss of leave for three months (for 64 days his jaw was sutured and he was required to visit doctor for 28 days). Thus, the Claimant is entitled for compensation of Rs.31572/- ($10,524 \times 3$) towards loss of leave. He is also entitled for travelling expenses to the tune of Rs.4,620/- which is duly established. He is also entitled to amount of Rs.1,879/- towards medicines and Rs.10,000/- towards attendant and special diet. The claimant is entitled to Rs.20,000/- towards pain and suffering. He is also entitled for Rs.20,000/- for discomfort and inconvenience he will be

required to suffer during his life time. Though he would be able to work as before the accident but the injuries he has suffered definitely affect his normal functioning of jaw. As there is no loss of future income claimant is not entitled for the same.

40. The claimant thus is entitled to a total compensation as below:-

Three months salary(10,524 x 3) loss of leave	Rs. 31,572/-
travelling expenses (Taxi bill worth Rs.3920/- + Rs.700/- petrol)	Rs. 4,620/-
Medicines	Rs. 1,879/-
Attendant and Special Diet	Rs. 10,000/-
Pain and suffering	Rs. 20,000/-
Discomfort and inconvenience	Rs. 20,000/-
Total	Rs. 88,071/-

Claimant is also entitled for interest @9% p.a. From the date of filing petition till its realisation.

41. Accordingly, I proceed to pass the following order:-

O R D E R

1. The appeal is partly allowed.
2. The judgment and award passed in Claim Petition No.75.2004 dated 28.11.2014 passed by the Claims Tribunal, is hereby set aside and substituted as under:-
 - (i) Claim Petition is partly allowed with proportionate cost.
 - (ii) The respondent Nos. 1 and 2 are jointly and severally liable to pay to the claimant amount of Rs.88,071 (Rupees Eighty Eight Thousand Seventy one only) (including amount awarded under Section 140 of the M.V. Act paid if any). The said amount will carry interest at the rate of 9%p.a. from the date of filing of the claim petition till its realisation.
 - (iii) Award be drawn accordingly.
3. The appeal is disposed off accordingly.

SMT. M.S. JAWALKAR,J.