

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 211 OF 2009

Shri Jayesh Patil,
S/o. Ashok Patil, about 31 years of age,
service, r/o. H.No.623, Kirlapal,
Dabal, Sanguem- Goa. Appellant

V e r s u s

1. Shri Rafik Suleman Machhiwala,
of major age, s/o. Sarethia Pathan,
r/o. Machhiwada, Sukhnath Chowk,
Junagadh, Gujarat – 362 001.
2. Shri Idrisbhai Koradiya,
s/o. Habibbhai Koradia,
major, r/o. Malia, Hatina, Junagadh,
Gujarat- 362245.
3. The New India Assurance
Co.Ltd., Rajkot, Gujarat. Respondents

Mr. V. G. P. Duple, Advocate for the Appellant.

Mr. E. Afonso, Advocate for the Respondent no.

Coram : M. S. JAWALKAR, JJ.

Reserved for Judgment on : 25th September,2020
Judgment pronounced on : 9th October, 2020.

JUDGMENT

1. Heard Mr. V. G. P. Dukle, learned Counsel for the appellant and Mr. E. Afonso, learned Counsel for the respondent no.3.

2. The present appeal is filed by injured claimant being aggrieved by the judgment and award dated 09.04.2009 passed by the Motor Accident Claims Tribunal, South Goa, at Margao, in Claim Petition No. 75 of 2008.

3. The claim of the petitioner before Claims Tribunal was as under :

On 09.01.2008, claimant and three others were returning by Maruti Car bearing registration no. GA-02/J- 7649 from Kankauli to Goa. Deependra Honawarkar was driving Maruti car. When Maruti car reached at Pinguli, Kudal at about 4.30 p.m., truck bearing no. GJ 11-X-8187 coming from opposite direction came to its wrong side of the road in a rash and negligent manner and dashed against Maruti car. The applicant sustained severe injuries. He was hospitalised

thereafter. His Maruti car also sustained damage beyond repairs. As per the claim, he was of the age of 30 years at the time of accident and was in service with Iron and Steel Company at Kalay, Costi, Sanguem, Goa. He was earning Rs.6,000/- per month. The respondent no.1 is the driver, respondent no.2 is registered owner and respondent no.3 is Insurance Company of the involved truck. He claimed amount of Rs.3,00,000/- as compensation from the respondents.

4. The learned Tribunal after considering the evidence on record and submissions from the parties, held that claimant is entitled for compensation of Rs.35,400/- (including interim compensation).

5. The present appeal is filed by the appellant as the compensation awarded by the Tribunal is not fair and just compensation and very meagre amount is awarded. It is submitted that only amount of Rs.25,000/- awarded towards permanent disability and for pain and suffering Rs.5,000/-. No amount towards

medical expenses is awarded. No amount is granted towards loss of salary.

6. The learned Tribunal failed to appreciate the medical certificate issued by the Doctor of Government Hospital and evidence on record in connection with the treatment. The learned Tribunal has not even considered the after effects of the said injuries and of permanent disablement and inconvenience on the life of the appellant.

7. Learned Counsel for appellant, Shri Duple, submitted that order passed by the Tribunal is illegal erroneous and contrary to evidence led by the claimant in the petition. While deciding claim of the claimant, the Tribunal failed to take into consideration the medical certificate which shows half inch shortening of the leg, thrice he required to undergo operation, medical expenses, travelling expenses, attendant charges pain and sufferings cost of leave, future inconvenience.

8. Learned Counsel for the appellant has relied on the citations in the case of *Kajal vs Jagdish Chand and Ors.*, 2020 SCC OnLine SC 127 (Civil Appeal No. 735 of 2020) Supreme Court, *Rajkumar vs Ajay Kumar*, (2011) 1 SCC 343 (Civil Appeal No. 8981 of 2010), of Supreme Court, *Mr Fakruddin Mulla and Ors. vs Mr. Gangaram and Ors.* decided on 05.09.2018 in *First Appeal No.11 of 2018* of the Bombay High Court at Goa.

9. In the case of *Kajal vs Jagdish Chand & Ors.* (supra), Hon'ble Apex Court relying on the judgment of *Rajkumar vs Ajay Kumar & Ors.* (supra), laid down the heads under which compensation is to be awarded for personal injuries at para 16 thus :

“16. In Raj Kumar v. Ajay Kumar and Others, this Court laid down the heads under which compensation is to be awarded for personal injuries.

"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.

Nonpecuniary 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 (2011) 1 SCC 343.

10. In the case of *Mr Fakruddin Mulla and Ors. vs Mr. Gangaram and Ors.* (supra), it is held by this Court at para 23 thus :

“23. Insofar as compensation under the head of actual loss of salary during the period of treatment is concerned, there is no acceptable evidence as to the actual period of treatment. There is also no evidence of an attendant being employed or the expenses, on such attendant. However, I am inclined to award a consolidated amount of Rs.25,000/- towards the special diet and the travelling expenses.

11. As against this, learned Counsel for respondent no. 3, Shri E. Afonso, submitted that the order passed is perfectly justified and there is no evidence as regard to attendant or medical or traveling expenses

and claimant's claim is exorbitant. There is no case for interference in the judgment and award of the Claims Tribunal. Learned Counsel for respondent no. 3 relied on judgments in First Appeal nos.87 of 2018, 128 of 2018 and 37 of 2016. *Mrs Ana Paula Mendes vs Mr Vasant Shenvi Kunkalienkar & ors.*, of this Court, in support of his contention that there is no loss of earning. There was 5 percent disability in the matter before this court and it was held that there is no question of loss of future earnings or loss of further prospects as appellant continued to be in service on the same post and is drawing same salary as she was getting on the day of accident. She has also not suffered any loss of promotional aspect on account of the disability or was asked to work on a lower post. Learned Counsel also relied on judgment in First Appeal no. 28 of 2018 and 37 of 2016 of this court decided on 22.11.2018 and 05.09.2018 on similar proposition.

12. Learned Counsel submitted that there is no question of loss of amenities as there will be no difference in his earning capacity nor he is

a player or a person who would be deprived due to his disability the work he was doing prior to accident.

13. Rival contentions now fall for my determination :

In view of the award passed, the claimant established that he sustained injuries due to dash given by truck bearing registration no. GJ 11 - X-8187 to Maruti car bearing registration no. GA 02 J 7649 in which claimant was traveling and the said accident occurred due to rash and negligent driving of the said truck by respondent no. 1. The learned Tribunal also held that he is entitled for compensation from respondent nos. 2 and 3. It has come on record that at the time of accident, claimant was 30 years of age, employee of Apparel Iron and Steel Private Limited. He was drawing gross salary of ₹6102/- per month. The accident occurred on 09.01.2008. He was admitted in GMC on 09.01.2008 and discharged from the hospital on 05.02.2008. Injury sustained by him resulted in permanent disability. It is the claim of the claimant that he could not join the duties for six months. He also incurred ₹7360.80 for medicines and ₹10,000/- for

medical treatment. He also incurred Rs. 8000/- towards traveling expenses in connection with follow up treatment and on all counts, he claimed ₹3,00,000/-.

14. As birth certificate is on record showing his date of birth as 26.04.1977, accident occurred on 09.01.2008. Thus he is of the age of 30 years at the time of accident. The learned Tribunal though held that the medical certificate exhibit 41 is duly proved, it is held that there is no positive evidence to conclude that there is any loss of earning capacity due to permanent disability.

15. Learned Counsel for respondent relied on the citation in the case of *Raj Kumar vs. Ajay Kumar & anr.* (2011) 1 SCC 343 wherein Hon'ble Apex Court held that in disability certificate, the extent of disability of a limb (or part of the body) cannot be assumed to be extent of disability of whole body. Tribunal should not mechanically apply percentage of permanent physical disability as percentage of economical loss or loss of earning capacity but must

assess functional disability and in the said matter the injured claimant, who was a cheese vendor, sustained fracture of lower limb of left leg and fracture of right radius. The Tribunal assuming 45% disability has shown in disability certificate as economical disability. The Tribunal overlooked to the fact that disability certificate referred to 45% disability to left lower limb and not to functional disability of the body. The Hon'ble Apex Court assessed permanent functional disability of body as 25% and loss of future earning capacity as 20%. It is also held that in case of injured claimant, no need to deduct one third of income towards personal and living expenses.

16. No amount towards medical bills, traveling expenses or loss of income for six months awarded by the Claims Tribunal for want of evidence. Learned Tribunal awarded Rs. 200/- per day towards attendant for 27 days from the admission of the claimant in the hospital till discharge i.e. ₹5400/- and awarded ₹5000/- for pain and suffering, ₹25,000/- towards permanent disability. Thus, total amount awarded is ₹35,400/-.

17. The learned Tribunal, in my considered view, has failed to take into account the evidence of the claimant in its proper prospective. While deciding the claims of personal injuries, there has to be some guess work to be carried out by the Tribunal. The award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. As held in the case of ***Raj Kumar vs. Ajay Kumar & anr.*** (supra) the Hon'ble Apex Court held that :

"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. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned."

18. So far as amount towards medicines and medical treatment, transportation is concerned, the amount claimed towards medical bill is ₹7360.80 and ₹10,000/- for medical treatment. The medical certificate clearly shows that there is 5% permanent disability and leg shortening by half inch.

19. It is a matter of record that claimant resides at Sanguem, South Goa, which is more than 50 kms from Government College at Bambolim. He claimed that he required to attend hospital for six times after his discharge. He was operated thrice. He produced on record details about his attendance. Therefore, not giving a single pie for traveling amount is unjustified. Learned Counsel for the appellant also pointed out that in the judgment relied upon by Shri Afonso, learned Counsel for the respondent no.3, it is held that though there is no loss of income, there is a loss of leave and which had to be compensated.

20. This Court relied on the citation in the case of *Ramveer Singh vs Rajesh and ors.* reported in *2014 ACJ 1090* and held that claimant is entitled to be paid full salary for the loss of leave.

21. Though Tribunal held that the salary of the claimant was ₹6102/-, it is held that there is no loss of income.

22. While awarding amount of compensation the learned Tribunal failed to take into consideration the Medical Certificate placed on record which is issued by the Government Hospital, Goa. It is specifically mentioned in the the said Certificate that there is shortening of leg by half inch so also the patient was ambulatory without any assistance from August,2008 onwards. In view of these specific Certificate the learned Tribunal ought to have considered his absence for 6 months from the duty as genuine one. Though the claimant placed on record 21 medical bills amounting to ₹7360.80, these bills were not considered by the Tribunal on the ground that they are not proved. It is settled principle of law that Court has to do some

guess work on the basis of the facts and circumstance. No strict rule of evidence can be applied. From the medical paper, it appears that it is the case of closed communitied fracture subtrochantric of right femur. He was required to undergo operations. Considering this, the amount of these medical bills is very megre and there was no reason not to allow the same.

23. From the record it is also evident that the claimant is resident of Kirlapal, Dabal, Sanguem, Goa. The said place of residence is near about 50 kms away from the GMC Hospital. Even the Medical Certificate shown that he was attending OPD at regular intervals after discharge. In view thereof, it would have just and fair on the part of the Tribunal to grant traveling expenses. Therefore, I am of the considered opinion that the award granted is not just and fair compensation and it required to be enhanced. Accordingly, the amount of compensation is awarded as follows:

Towards medical bills	₹ 7,360=00
Expenses towards attendant	₹10,000=00

Traveling expenses	₹ 6,000=00
Loss of leave for six months (₹6,000/- X 5 months)	₹36,000=00
Towards pain and suffering	₹15,000=00
Loss of amenities, enjoyment and discomfort in life due to permanent disability	<u>₹25,000=00</u>
Total	₹99,360=00

24. Accordingly, I proceed to pass the following :

ORDER

1. The appeal is partly allowed.
2. The Judgment and Award dated 09.04.2009, passed by the learned Tribunal, Margao, in Claim Petition No.75 of 2008 is hereby modified as under :
 - (i) The Claim Petition is partly allowed.
 - (ii) The respondent nos.2 and 3 are jointly and severally liable to pay the amount of compensation in the sum of ₹99,360/- (Rupees Ninety Nine Thousand Three Hundred And

Sixty only) (including amount awarded to the claimant under Section 140 of the Act), which shall carry interest @ 9% p.a. from the date of filing of Claim Petition, till its realization.

(iii) Award be drawn accordingly.

3. If the insurance company have already paid the amount of compensation as per the award of Claim's Tribunal in Claim Petition No.75 of 2008 the Company is entitled to adjust the same while depositing the award amount.
4. The present appeal is accordingly disposed off with costs.

M. S. JAWALKAR

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