

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.137 OF 2010

Bajaj Allianz General Insurance Co.Ltd.,
Sesa Ghor, 3-C & D,
Patto Plaza, 3rd floor,
Panaji-Goa.

.... Appellant

Versus

1. Mr. Chandan Tulsidas Gauthankar
r/o Chamunda Enclave,
Building No.D-3, 1st floor,
Near Talaulikar Hospital,
Santa Cruz, Tiswadi, Goa;

2. Mr. Amit Suresh Kande
of major age, r/o Polular
Apartments, Flat No.5,
St. Agostinho, 1st floor,
St. Cruz, Tiswadi, Goa.

3. Mr. Suresh Rajaram Kande
r/o Polular Apartments, Flat No.5,
1st floor, St. Agostinho,
St. Cruz, Tiswadi, Goa.

3(a). Smt. Supriya Suresh Kande,
r/o Polular Apartments, Flat No.5,
1st floor, St. Agostinho,
St. Cruz, Tiswadi, Goa.

(LR.'S of respondent no.3)

.... Respondents

Mr. A. Kakodkar, Advocate for the Appellant.

Mr. Shivan Desai, Advocate for the Respondent No.1.

Mr. A. R. Kantak and Mr. R. Kantak, Advocates for Respondents No.2 and 3(a).

Coram:- M.S. SONAK, J.

Reserved on:- 13th July, 2020

Pronounced on:- 16th July, 2020

ORAL JUDGMENT

Heard Mr. A. Kakodkar for the Appellant, Mr. Shivan Desai for the Respondent No.1 and Mr. A. Kantak along with Mr. R. Kantak, for Respondents No.2 and 3(a).

2. This appeal is directed against the judgment and award dated 02.06.2010 made by the Motor Accident Claims Tribunal (MACT) in Claim Petition No.102/2005 instituted by respondent no.1 – claimant.

3. On 10.07.2005 the claimant met with an accident whilst riding his Hero Honda motorcycle, when, a Maruti car bearing registration no.GA-01-S-0566 dashed him. As a result of this accident, it is the case of the claimant, that he was seriously injured and ultimately sustained disability to the extent of 20%. It is the case of the claimant that for almost 825 days he could not report for duties at the Directorate of Accounts, Government of Goa where he was employed

as a Records Sorter and earning salary of ₹9,427/- per month. As against the claimant's claim of compensation of ₹9,34,000/-, the MACT, by the impugned judgment and award, has awarded the claimant compensation of ₹6,28,425/- together with 9% interest thereon from the date of application till the date of payment. Hence this appeal by the appellant-insurance company.

4. Mr. A. Kakodkar, the learned counsel for the appellant submits that necessary application under Section 170 of the Motor Vehicles Act, 1988 (said Act) was allowed by the MACT since, neither the owner nor the driver of the insured vehicle were interested in defending the claim petition. He submits that there is no evidence on rashness or negligence on the part of the driver of the insured vehicle. In any case, he submits that the compensation amount awarded by the MACT is excessive and warrants interference.

5. Mr. Kakodkar submits that in the present case even if it is assumed that the claimant had suffered from 20% disability still, such disability, neither rendered the appellant unfit to discharge his government service nor did such disability entail reduction in any financial benefits otherwise due to the claimant. He points out that in fact the claimant's salary was enhanced from ₹9,427/- to almost ₹19,000/- after he reported for duties. Mr. Kakodkar submits that the MACT, without indicating any reasons has proceeded to award

compensation of ₹3,39,375/- to the claimant on account of the 20% disability, which is not at all justified. He relies on ***Raj Kumar v. Ajay Kumar & Anr. – (2011) 1 SCC 343*** in support of his contention that no compensation was at all due and payable on account of the disability of 20%.

6. Mr. Kakodkar submits that there is no evidence on record that the claimant was required to stay at home for 825 days on account of the injuries sustained in the accident. He submits that even the private doctor (AW4) examined by and on behalf of the claimant has deposed that the period of one and a half year would be sufficient for full recovery. He submits that there is no proper evidence that the claimant had to forego any financial benefits or that there was any loss of earnings on account of the claimant's absence for 825 days. He submits that the MACT has in fact misread the claimant's evidence on the issue of absence without pay. For all these reasons Mr. Kakodkar submits that even the award of ₹2,59,050/- by the MACT warrants interference.

7. Finally, Mr. Kakodkar submits that the award of interest @ 9% p.a. is also quite excessive in the facts and circumstances of the present case. He relies on ***Managing Director, T.N. State Transport Corporation v. Sripriya and Others – (2007) 13 SCC 641*** and ***Dharampal and others v. U.P. State Road Transport Corporation –***

(2008) 12 SCC 208 to submit that interest @ 7.5% p.a. might be appropriate and not 9% p.a. as awarded by the MACT in the present case.

8. Mr. S. Desai, the learned counsel for the claimant defends the impugned judgment and award on the basis of the reasoning reflected therein. In fact, he points out that the award towards services of an attendant, transport expenses and pain and suffering is totally inadequate. He points out that the accident in the present case was quite violent as a result of which the claimant was out of action for almost three years. The claimant suffered serious injuries both physical and psychological and therefore, compensation to the extent of at least ₹1.5 lakhs was due under the heading of pain and suffering alone. In addition, enhancement is also due towards compensation for appointing an attendant and transportation from home to hospital and vice versa which continued for a period of almost three years from the date of the accident.

9. Mr. Desai submits that there is evidence on record that on account of the claimant's absence from service, he was deprived of the benefits of the 6th Pay Commission. He submits that the MACT has gone by the chart/principles emanating from the second schedule of the said Act prior to its amendment and determined the compensation at ₹3,39,375/- in respect of the 20% disability incurred by the

claimant. He submits that resort to such chart or principles emanating from such chart is clearly permissible and therefore there is no error in the award made.

10. Mr. Desai points out to the evidence in which the claimant has clearly deposed that he had exhausted his leave and was thus forced to avail of leave without pay. Mr. Desai submits that in such a case there is absolutely no error in the award of ₹2,59,050/- made by the MACT. Mr. Desai submits that the award of interest is discretionary and the discretion has been exercised in a reasonable manner warranting no interference. For all these reasons Mr. Desai submits that this appeal may be dismissed and in fact, the compensation amount be enhanced as urged earlier.

11. Mr. Kantak submits that the vehicle in the present case was duly insured and it was not even the case of the appellant-insurance company that there was any breach of the terms and conditions of the insurance policy.

12. The rival contentions now fall for determination.

13. On the aspect of rashness and negligence on the part of the driver of the insured vehicle there is ample evidence on record. The MACT has correctly appreciated such evidence and even observed that the damages to the two vehicles give a fair indication of the violence of

the impact. AW2, the Pancha has also deposed to the status at the site of the accident. The oral as well as the documentary evidence on record is more than sufficient to conclude that the accident took place on account of the negligence of the driver of the insured vehicle without any contribution from the claimant. There is no error whatsoever pointed out on behalf of the appellant to the finding to this effect recorded by the MACT, which is even otherwise, borne out from both the oral as well as documentary evidence on record. As such it is not possible to accept Mr. Kakodkar's first contention on the aspect of any absence of rashness or negligence on the part of the driver of the insured vehicle.

14. The MACT, in the present case, has accepted claimant's case regards sufferance of 20% disability on account of the accident in question. On that basis the MACT has awarded the claimant compensation of ₹3,39,375/-. However, from the perusal of the impugned judgment and award there is no clear reasoning in justification of such an award. The only discussion is to be found in paragraph 18, in which, it is merely stated that on the basis of the claimant's earnings at ₹9,427/- per month and the disability of 20%, the claimant is awarded an amount of ₹3,39,375/-.

15. Mr. Desai however contended that the claimant had deposed that on account of his absence of 825 days, he was deprived the

benefits of 6th Pay Commission scales and this compensation amount has a nexus with such deposition. From the perusal of the deposition in question, it is not possible to accept Mr. Desai's contention. The deposition is entirely vague and the claimant, who is an employee of the Directorate of Accounts has taken no efforts to make good this contention. Even though the claimant examined Ashwin Sha, from the Directorate of Accounts in support of his claim petition, this witness, was neither asked nor has he deposed to this aspect of denial of benefits of 6th Pay Commission on account of the claimant's absence. Therefore, it cannot be said that the claimant has established that he was deprived of any financial benefits under the 6th Pay Commission scales on account of his absence from service. From the perusal of the impugned judgment and award as well, it does not at all appear that the award of ₹3,39,375/- has any nexus with the issue of any alleged deprivation of the 6th Pay Commission scales to the claimant.

16. Mr. Desai in the alternate relied upon the second schedule to the said Act to submit that the MACT has followed the principles emanating therefrom. By reference to Clause 5 of the second schedule, he submitted that the MACT, in all probabilities has gone by the disability percentage and the monthly income of the claimant to arrive at the figure of ₹3,39,375/-. He submits that which a course of action is permissible and therefore this award warrants no interference.

17. Again it is not possible to accept Mr. Desai's contention. In the first place, there was absolutely no case made out for reference to the second schedule particularly in the light of the ruling of the Hon'ble Supreme Court in the case of *Raj Kumar v. Ajay Kumar & Anr.* (*supra*). Secondly, the claimant in the present case was a government servant, who was not deprived of his salary or other benefits on account of his disablement to the extent of 20%. Whatever salary the claimant was actually deprived on account of his leave without pay may be awarded by way of compensation. However, there is no case made out by the claimant that he was deprived of any financial benefits on account of the disability of 20% incurred by him due to the accident. Thirdly, the claimant, has not at all been candid to the MACT on the aspect of his true and correct age. In the absence of any evidence on the aspect of age, there was no question of resorting to the principles in the second schedule, which, in any case, were not at all attracted to the facts and circumstances of the present case.

18. On the aspect of age, the claimant deposed that he was 44 years of age and even undertook to produce his birth certificate on the next occasion. In fact he was directed by the MACT to produce his birth certificate on the next occasion. However, the claimant failed to produce the same. The MACT, in para 14 speaks about the contemporaneous record on the aspect of age. However, there is absolutely no record on the aspect of age of the claimant. The

claimant, could have at least produced the age declared by him at the time of his employment with the government. The claimant, has obviously not been candid to the Court on the aspect of his age. However, it is made clear that this is not the only ground for interfering with the award of compensation of ₹3,39,375/- because, there are other substantive grounds on which such compensation should never have been awarded to the claimant under this head.

19. As noted earlier, even if it is accepted that the claimant incurred disability to the extent of 20% there is absolutely no evidence on record to indicate that the claimant, on account of this disability, suffered any pecuniary damage, in so far as his salary or service benefits are concerned. The record in fact indicates that when the claimant reported for duties after a long absence of about 825 days, he was paid salary of ₹19,000/- or thereabouts, when, earlier his salary was only ₹9,427/- per month. As noted earlier, the claimant was a government servant working as a Record Sorter in the Accounts Department. There is absolutely no evidence lead by the claimant to establish that the disability in any manner interfered with his work or on account of the disability, his salary was reduced or any pecuniary benefits taken away. In the absence of any such case being made out or evidence being lead, there was no justification for award of compensation of ₹3,39,375/- by the MACT.

20. In *Raj Kumar v. Ajay Kumar & Anr. (supra)*, the Hon'ble Supreme Court has held that 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 ability (this is also relevant for awarding compensation under the head of loss of amenities of life). 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.

21. The Hon'ble Apex Court, at para 14 has further given some examples and it is only appropriate that para 14 is quoted verbatim since, the same, would apply to the facts and circumstances of the present case substantially.

“For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred per cent,

if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of 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 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."

[Emphasis supplied]

22. Applying the aforesaid principle as well, the award of ₹3,39,375/- in favour of the claimant warrants interference in the facts and circumstances of the present case. The claimant, as noted earlier, was a government employee in the Accounts Department and there is absolutely no evidence that the claimant was either disabled from discharging his duties as a government servant or that there was any loss in the earnings on account of his disability. Clearly therefore the award of ₹3,39,375/- cannot be upheld.

23. The MACT has awarded an amount of ₹2,59,050/- for loss of earnings during the period of the claimant's leave which extended to 825 days. Now if the affidavit in evidence on behalf of the claimant is perused, then, it is clear that the claimant has deposed that all his leave period was exhausted and since November, 2005 he was on leave without pay. This means that the claimant was on leave with pay for the period between 10.07.2005 and let us say 30.11.2005. The period from 01.12.2005 and 12.10.2007 comes to 678 days, since, it is an admitted fact that the claimant resumed duties w.e.f. 13.10.2007. Since, there was some dispute as to whether the month of November, 2005 should be included as a month in which the claimant was on leave without pay, the number of days, can be rounded up to 700 days, which comes to about 23 months. The compensation, if determined at ₹9,427/- per month for this period comes to approximately ₹2,16,821/- which can be rounded up to ₹2,17,000/-. The award of ₹2,59,050/- will therefore have to be modified to ₹2,17,000/-.

24. There is however evidence on record to indicate that the claimant was the victim of a violent accident. The evidence speaks about the surgeries which the claimant was required to undergo and the physical and mental injuries sustained by him as a consequence. Though, it is true, as pointed out by Mr. Kakodkar, that the claimant secured reimbursement of all medical expenses, nevertheless, award of only ₹10,000/- towards pain and suffering is totally inadequate. In

such matters, the duty of the Court is to determine just compensation. Therefore, although, the compensation under certain heads has been deleted or scaled down because it is legal to do so, the claimant, cannot be deprived of just compensation if, from evidence on record the same is found to be due and payable to the claimant. Even the award of ₹10,000/- each under the heading of engagement of services of an attendant or transport is quite inadequate considering the length of time during which the treatment of the claimant continued. As against these two heads, it is reasonable to hold that the claimant is entitled to compensation of ₹20,000/- each as against ₹10,000/- awarded by the MACT. Similarly, against the head of pain and suffering, the claimant, is entitled to compensation of ₹45,000/- and not merely ₹10,000/- as has been awarded by the MACT.

25. Thus, the compensation in the present case is required to be determined at ₹3,02,000/- as against the determination of ₹6,28,425/- made by the MACT. Since the discretion has been exercised by the MACT, there is no warrant to interfere with the rate of interest. The decisions relied upon by Mr. Kakodkar no doubt, speak about the award of interest @ 7.5% p.a. however, such decisions, do not say that the award of interest @ 9% p.a. in respect of an accident which has taken place in the year 2005 amounts to any error warranting interference. The award of interest @ 9% p.a. is therefore not interfered with.

26. This appeal is therefore partly allowed. The impugned judgment and award is modified and the compensation amount is determined at ₹3,02,000/- in place of ₹6,28,425/-. The interest @ 9% p.a. is maintained. There shall be no order as to costs.

27. The learned counsel for the parties pointed out that the appellant had deposited the awarded amount in this Court out of which some amounts have already been withdrawn by the claimant. If this is so, the Registry, to work out the entitlement of the claimant in terms of this judgment and award within a period of 8 weeks from today. If, the claimant has withdrawn excess amount, the claimant, to deposit the same in this Court within 4 weeks from the date of such determination together with interest @ 9% p.a. The appellant-insurance company is granted liberty to withdraw the amounts proportionately.

M. S. SONAK, J.