

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.59/2012

1. Conceicao M. Fernandes,
son of Pedro Fernandes,
Resident of House No.920,
Grande Rumde,
Curtorim, Salcete, Goa.
Driver cum owner of Mahindra Jeep
bearing No. GA-02/A-7464

2. United India Insurance Co. Ltd.,
2nd Floor, Jamnadas Building,
P. B. No.15, Church Road,
Curchorem - Goa.

...APPELLANTS

Versus

Miss Smita Bhikaji Dessai
Aged 22 years,
Daughter of Bhikaji Vithal Dessai,
Resident of Flat No. S-2,
Building D, Bansai Plaza,
Bansai, Curchorem - Goa.

...RESPONDENT

Mr. A. R. S. Netravalkar, Advocate *for the Appellants.*
None *for the Respondent.*

CORAM: M. S. SONAK, J.

DATED: 24th September 2021

JUDGMENT:

1. Heard Mr. Netravalkar for the appellants. The respondent though served neither present nor represented.

2. This appeal is directed against the Judgement and Award dated 21.12.2011 made by the Motor Accident Claims Tribunal, awarding the respondent/claimant additional compensation of ₹4,55,000/- together with simple interest of 9% per annum from 17.02.2009 till final payment.

3. Mr Netravalkar firstly contended that there was no rashness and negligence on the part of the driver of the Mahindra jeep and therefore, the claim petition should have been dismissed. In the alternate, he submits that the compensation awarded is exorbitant, contrary to the evidence on record and inconsistent with the law laid down in *National Insurance Company Ltd v. Pranay Sethi, (2017) 16 SCC 680*.

4. On the aspect of rashness and neglect there is ample evidence on record that establishes that the accident in which the claimant was injured took place due to the rash and negligent driving of the Mahindra jeep. The oral evidence as well as the sketch accompanying the panchanama establishes that the Mahindra jeep was driven at a fast speed and that too on the wrong side of the road. As a result, the jeep dashed against the Maruti car in which the claimant was travelling and the car went off the road thereby injuring the claimant and the others. The evidence on record indicates that the width of the road was 7.2

metres and the jeep had no business to be on the wrong side while travelling in the direction opposite to that of the Maruti car. Despite opportunity, the appellant could not establish any negligence on part of the driver of the Maruti car. Therefore, there is no merit in Mr. Netravalkar's first submission on the aspect of rashness and negligence.

5. On the issue of compensation, according to me the award against the head of 30% personal disability amounting to ₹4,21,200/- is on the higher side and the same warrants reduction to ₹3,00,000/- in the facts and circumstances of the present case. However, the compensation awarded against other heads calls for no interference because the same is borne out from the evidence on record and at the same time is reasonable.

6. In this case, the evidence on record suggests that the claimant sustained two sets of injuries. The first injury was the fracture lower end left radius/ulna with VIC and the second injury was fracture symphysis of mandible and so far as the first injury is concerned the claimant was discharged from the ward on 30.07.2008 after treatment of about 19 days. A forearm distractor was applied and she was advised to attend the OPD for regular follow up. Even the distractor was removed on 10.09.2008 and she was thereafter advised physiotherapy and follow up at OPD

and now the hurt certificate/medical certificate does not indicate that the claimant suffered any permanent disability on account of this first injury to the lower end left radius/ulna. No doubt, the claimant did suffer substantial pain and further, had to attend physiotherapy sessions due to this injury but the evidence does not establish that this injury resulted in any permanent disability as such.

7. The second injury i.e the fracture of the mandible required a dental surgery and ultimately resulted in permanent disability to the extent of 30% on account of the facial injuries.

8. Dr. Francis Akkara (AW2), who issued the disability certificate, deposed as follows:-

“On her examination I have observed the following:

Facial asymmetry present.

Scarring evident over a left lower lip.

Moth opening inadequate.

Occlusion Satisfactory.

Teeth present in a manner shown in a certificate and also missing of teeth and TMJ movements are not normal.

The percentage of disability as per the guidelines of evaluation for physical impairment in facial injuries is 30%. The certificate is taken on record and marked as Exhibit 35.”

9. The aforesaid medical evidence was virtually unchallenged and therefore, there is no doubt that the claimant was entitled to compensation for the injury suffered by her due to the fracture of left radius/ulna and the permanent disability due to the facial injuries aforesaid. However, the Tribunal has failed to make a distinction between the two types of injuries sustained by the claimant and proceeded on the basis that the 30% disability suffered by the claimant affected her capacity to work at Online Productivity Solutions Pvt. Ltd. to the extent of 30%. Now, the evidence on record does not quite entirely support such reasoning or finding.

10. There is no evidence that as a result of facial injuries, the claimant was very seriously disabled from discharging the duties she used to discharge before the accident. There is no evidence that she lost her job or that the salary or other emolument were reduced after she resumed her duties from the break of about 124 days. Therefore, the composite compensation of ₹4,21,200/- determined by the Tribunal may not be correct. Instead, this is a fit case where compensation of ₹2,25,000/- had to be awarded to the claimant on account of permanent disability of 30% due to the second injury. Mr. Netravalkar had submitted that compensation to the extent of ₹1,00,000/- or thereabouts would be appropriate. According to me, the compensation would

be determined at ₹2,25,000/- because the claimant at the time of accident was 22 years of age. The second injury caused facial asymmetry, scarring and inadequate mouth opening. Besides, at least three teeth were missing and three TMG movements were not normal. AW2 also deposed to the disfigurement of the claimant's face and stated that she would have some difficulty eating, chewing food and also her speech. Having regard to all this, compensation of ₹2,00,000/- towards 30% of the permanent disability in respect of facial injuries is due and payable.

11. In addition to the aforesaid compensation, ₹1,00,000/- is payable as regards to the first injury i.e fracture lower end left radius/ulna with VIC. On account of this injury a forearm distractor had to be applied and the claimant remained in the hospital for almost 20 days. Thereafter, the claimant had to attend OPD for the follow up and for the removal of the distractor, brachial plexus block and manipulation had to be carried out for VIC left hand and she was advised further physiotherapy. The claimant's work involves use of computers and the evidence on record suggests that her work was affected on account of her injury. Therefore, compensation of ₹1,00,000/- is due on this account.

12. Therefore, compensation of ₹4,21,200/- awarded by the Tribunal is substituted by compensation of ₹3,00,000/- against head of disabilities suffered by the injured. The rest of the award, as noted earlier, warrants no interference because the same is supported by evidence on record.

13. This appeal is therefore partly allowed and the additional compensation amount payable to the claimant is reduced from ₹4,55,000/- to ₹3,58,906/-. Save and except this reduction, no interference is called for with the rest of the award.

14. From out of the amount deposited in this Court, the Registry, to ensure that, the amount now determined together with proportionate interest that may have accrued thereon be disbursed to the claimant at the earliest. The balance amount together with the proportionate interest that may have accrued thereon can be refunded to the appellant no.2 (United India Insurance Co. Ltd.). Since in this case, the respondent has not appeared despite substituted service (newspaper publication), the South Goa District Legal Services Authority to make efforts to contact the respondent, so that, she can withdraw the compensation now awarded in her favour. The Registry to send a copy of this Judgement and Order to the Member Secretary, South Goa District Legal Services Authority.

M. S. SONAK, J.