

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 119 OF 2012**

United India Insurance Co. Ltd.,
Mascarenhas Building, 2nd Floor,
M.G. Road, Panaji-Goa. Appellant

Versus

1. Mr. Hemant Dabolkar, aged 37
years, married, r/o S-2,
Sambhari Residency, Near Old
Military Camp, Dhavli, Ponda-
Goa.
2. Shri Sasanand Vaigankar, ge 44
years, r/o Landscape Pinto
Park, Flat No. 132, Campal,
Panaji, Goa. Respondents

Mr. Emerico Afonso, Advocate for the Appellant.

Mr. Vaman Kurtikar, Advocate for Respondent No. 1.

CORAM: M.S. JAWALKAR, J.

RESERVED ON: 8th January 2021.

PRONOUNCED ON: 27th January 2021.

JUDGMENT:

Present Appeal is filed by Insurance
Company, respondent no. 2 in original Claim

Petition No. 67/2009 against the judgment and award dated 01.03.2012 of the Claims Tribunal, Panaji, Goa.

2. The case of the claimant before the Claims Tribunal was as under:-

Claimant was 35 years old, in service as the Branch Manager of the Goa Branch of M/s Space Office System Pvt. Ltd. and was earning Rs.27,050/- per month. On 06.02.2009, he was travelling as a pillion rider on the motorcycle bearing registration no. GA-09-C-0761, driven by one Shivaji Fatan from Ponda to Panaji. On reaching near William Construction, Sao Pedro at 11:30 hours or so, the respondent no. 1 came driving the Qualis Jeep bearing registration no. GA-01-R-5527 from the opposite direction and without giving hand or light signal took the

vehicle to his extreme right hand side and gave a dash to the motorcycle. In the said accident he sustained severe injuries to the right leg and other minor injuries. Crime came to be registered against the driver of the Qualis. The claimant sustained permanent disability. His family was also affected as he was the only earning member. He had lost his job due to the injuries. He claimed amount of Rs.23,00,000/- from the respondents.

3. After considering the evidence on record, learned Tribunal awarded compensation in the sum of Rs.13,88,700/- to the claimant.

4. Heard learned Counsel Mr. Emerico Afonso for the appellant and the learned Counsel Mr. Kurtikar for the respondent. In the Trial Court, respondent no. 2 alone contested the

Petition. No W.S. was filed by respondent no. 1, who was the driver as well as the owner of the offending vehicle.

5. Learned Counsel Mr. Afonso fairly conceded that the Claim Petition filed by the driver of the motorcycle, is already allowed and as Insurance Company has also satisfied the award, he will not advance arguments on the point of rash and negligent driving. Therefore, he will restrict his arguments only to the extent of quantum of amount of compensation. He submitted that 20% of disability cannot be considered for calculation of loss of earnings as the said disability is of the right lower limb and it is not of the whole body. For this, he relied on **(2011) 1 SCC 343 Raj Kumar Vs. Ajay Kumar**. It is further submitted that the claimant produced

Income Tax Returns for the year 2007-08 and for assessment year 2006-07, but has not produced any Income Tax Return of the relevant period. For this he relied on **(2018) 3 SCC 686, ICICI Lombard General Insurance Co. Ltd. Vs. Ajay Kumar Mohanty**. It is submitted that learned Tribunal failed to appreciate that percentage of disability is not of the whole body and it is only in respect of right lower limb. The learned Tribunal erred in holding the monthly income as Rs.27,050/- from the salary certificate without there being any deductions on personal allowances. His basic salary was Rs.10,000/- as per salary certificate and learned Tribunal ought to have considered the amount of Rs.10,000/- (which is his basic) as the monthly income of the claimant. He relied on **2013 (2) ALL M.R. 368, National Insurance Company Vs. Ms. Vaishali**

Harish Devare & Others. It is also the contention of the learned Counsel Mr. Afonso that the claimant admitted that he had gone to Dr. Parulekar on his own and he was not referred from G.M.C. Hospital. Thus, the treatment taken at Parulekar Hospital cannot be said to be required treatment and the bills claimed are not genuine. As such, the Tribunal granted exorbitant compensation without there being any basis and hence, prayed for setting aside the judgment and order.

6. As against this, learned Counsel Mr. Kurtikar submitted that in fact, the claimant is entitled for more than what is awarded. It is recorded in the judgment itself that the claimant is entitled for Rs.16,33,760/-, but for no reason the amount is reduced to Rs.13,88,700/-. He has

submitted that even if there is no Appeal filed by the claimant, the Court can grant just compensation. He relied on citation **2013 (2) ALL MR 368, National Insurance Company Vs. Ms. Vaishali Harish Devare & Others** and **2015 (1) CCC 108 (SC), Jitendra Khimshankar Trivedi & Others Vs. Kasam Daud Kumbhar & Others**. The claimant examined in all 9 witnesses before the Tribunal. He has examined the driver of the motorcycle, Shivaji Fatan, AW-1. He also examined AW-2, Vishwanath Chari and AW-4, Shiva Naik. Evidence of all these three witnesses is in respect of accident and rash and negligent driving of the driver of Qualis and it is not necessary to discuss the same. Claimant examined Dr. Parulekar as AW-3. He examined Bhaktesh Khandeparkar, who was attendant for the claimant (AW-5). Claimant

has examined himself as AW-6, Prashant Rane as AW-7 to prove his salary, AW-8, Anand Gaonkar as attendant in the hospital, AW-9, Dr. Ravindra Khedekar of Doctor Khedekar's Diamond Hospital, AW-10 (wrongly recorded as AW-9) Dr. Shivanand Bandekar of G.M.C., Department of Orthopaedics, who has issued the Disability Certificate.

7. Respondent no. 2, Insurance Company, examined respondent no. 1, driver and owner. However, as he was on the point of rash and negligent driving, it is not necessary to discuss his evidence in view of the submission of the learned Counsel Mr. Afonso.

8. Learned Advocate Kurtikar relied on the following citations:

- i. *2018(1) Bom.C.R.510, Sameer S. Desai Vs. Jeevan Narayan Naik & Another;*
- ii. *2015(5) ALL MR 339, Smt. Rammurti d/o Ramprakash Mishra & Others Vs. Rudresh B. Tiwari (D) Thr. LRs.;*
- iii. *2020 ALL SCR 1760, Pappu Deo Yadav Vs. Naresh Kumar & Others;*
- iv. *2020 ALL SCR 1616, Erudhaya Priya Vs. State Express Transport Corporation Ltd.;*
- v. *2013 (4) ALL MR 183, New India Assurance Co. Ltd. Vs. Mr. Aslam Ajgarali Makrani & Another;*
- vi. *2012 SAR (Civil) 733, Kavita Vs. Deepak & Others and*
- vii. *2018 SAR (Civil) 1221, Anant son of Sidheshwar Dukre Vs. Pratap son of Zhamnnappa Lamzane & Another.*

9. The other decisions relied on behalf of Mr. Kurtikar are on the point of rash and negligent driving and as such, they are not considered by me.

10. The rival contentions now fall for my consideration.

11. It is admitted position that claimant was pillion rider of the motorcycle and in view of submission made by the learned Counsel for the appellant there is no dispute/argument on the issue of rash and negligent driving. The claimant examined himself as AW-6. He placed on record hurt certificate, discharge card, medical bills, medical bills, salary certificate, income tax returns for the assessment year 2006-07 and 2007-08. As per his deposition, he met with an accident on 06.02.2009 due to the dash given by the Qualis Jeep (offending vehicle). After the accident, he was shifted to GMC, Bambolim and admitted in the Department of Orthopedic. He was operated on the same day for fracture of right

leg. He was discharged on 01.04.2009 i.e. after 55 days. Thereafter, he again underwent treatment for a period of 16 days i.e. from 01.06.2009 to 16.06.2009 at Dr. S.K. Parulekar Hospital, Kudal, Sindhudurg and was required to undergo operation again for his right leg. As there was no improvement to his fractured leg, he was required to take advance treatment at Khedekar's Diamond Hospital, Chembur, Mumbai, wherein biological plating with lock in screw was done and for harvesting, osteoblast cells were injected at the fracture site. He deposed that he was admitted in that hospital on 13.07.2010 and discharged on 26.07.2010 i.e. for 14 days. He further deposed that he has to suffer for his whole life. He lost his job. He was earning Rs.27,050/- per month and was paying income tax. He incurred amount of Rs.1,05,000/- towards

purchase of medicines, medical check up, special diet, medical instruments, attendant charges, transport charges etc. and Rs.2,00,000/- for his above treatment when he was at Mumbai at Khedekar's Hospital. He claimed amount of Rs.23,00,000/- as compensation.

12. To establish the medical expenses and the injuries the claimant sustained, he examined Dr. Shivanand Bandekar, Director, Professor and Head of Department of Orthopedics, GMC. The claimant examined Dr. Parulekar as AW-3 and Dr. Ravindra Khedkar as AW-9.

13. Dr. Bandekar from GMC deposed that he examined the claimant to evaluate the percentage of permanent disability. He deposed that the claimant had an united tibia with moderate

limitation of movement of right ankle joint and ambulatory with a limping gait. The percentage of the permanent disability resulting from the moderate stiffness was 20% as per ALIMCO Scale. The disability certificate at Exhibit-95 is proved through this witness. He has deposed that the patient was discharged about after two months from his admission. He deposed that the patient would have no difficulty with the limping gait to do his job as medical representative, but, he will have difficulty in running and squatting but no difficulty in climbing upstairs.

14. Dr. Parulekar (AW-3) deposed that the claimant was discharged on 16.06.2009 from his hospital at Kudal. On examination he found that the claimant had suffered fracture of left tibia and left leg clavicle fracture. He operated the

claimant on an Ilizarov Fixator and the claimant followed up treatment for about 3 to 4 months thereafter. The discharge card and medical bills of Dr. Parulekar's Hospital and Medical Stores are established by this witness. It is admitted fact that the claimant came on his own without any reference from the Government hospital. He deposed that the patient with Ilizarov Fixator will not be able to do his routine work, but, can move about with the help of crutches or walker.

15. AW-9, Dr. Ravindra Khedekar, Mumbai deposed that on 08.03.2010 claimant, Hemant Dabolkar came for infected, non-union of right tibia fibula. His x-ray was showing dead lacryotic bone lying in a living bone. After basic investigation and treatment he discharged the claimant and got him admitted again on

10.06.2010 for aspiration of the bone marrow from the iliac bone to grow the osteoblast cells. After his re-admission on 13.07.2010 he was discharged on 26.07.2010 and then followed up as an OPD patient. He identified the discharge card at Exhibit-40. Documents such as hospital bills, pharmacy bills, x-ray bills, pathology bills etc. are all collectively at Exhibit-78.

16. He specifically deposed that the fracture was not united at the time of discharge and was in the process of healing. He deposed that the claimant would come to him every six weeks for four months. In cross, he deposed that the treatment given by him would not have been available at GMC, Goa. The harvesting of the osteoblast cells is not done in Goa. He also deposed that the patient is walking with a limping

gait facing difficulty in climbing, inability to squat, run or walk fast.

17. Thus, from the evidence it is clear that the claimant was admitted in GMC from 06.02.2009 to 01.04.2009 and then in Dr. Parulekar's Hospital from 01.06.2009 to 16.06.2009 and then at Dr. Khedekar's Hospital from 13.07.2010 to 26.07.2010. As such, he was hospitalized for around 85 days. It has also come on record that even after discharge from Khedekar's Hospital at Mumbai, he used to attend OPD at Khedekar's Hospital every six weeks for about four months. Every bill is duly established by examining the concerned Doctor. The claimant has also examined the attendants. Thus, his claim towards medical expenses and other miscellaneous expenses is genuine and he is

entitled for the same. It is vehemently argued by the learned Advocate for the appellant that it is admitted by the claimant that GMC did not referred the claimant to any hospital. However, it is revealed from the deposition of both the subsequent treating Doctors that the claimant was not fully recovered. Dr. Khedekar has also deposed that harvesting of ostoblast cells treatment is not available at Goa. In such circumstances, there is nothing wrong to go to advanced hospital for treatment.

18. To establish his salary he examined Prashant Rane (AW-7). He was authorized by Space Office Systems to appear in the Court and he is Channel Manager in the said Company. He also produced his ID card. He deposed that claimant was in employment of the same

Company as a Branch Manager. The claimant had joined in August, 2008. His work was to go at sites in connection with his duties. His gross salary was Rs.27,000/- plus conveyance allowance. This witness proved salary certificate at Exhibit-62. From the salary break up, it appears that he used to receive salary of Rs.27,050/- in hand after deduction.

19. The learned Tribunal awarded an amount of Rs.10,00,000/- on the basis of proved earnings, Rs.2,17,160/- towards medicines, Rs.15,000/- towards attendant services and Rs.2,00,000/- towards loss of income and Rs.1,00,000/- towards pain and suffering and came to the conclusion that the claimant is entitled Rs.16,33,760/-, but, reduced it to Rs.13,88,700/- as the claimant is receiving the same in lumpsum. In my considered

opinion, there is no basis or rational reason for reducing the same nor any justification for awarding the amount. The present Appeal is filed by the Insurance Company on the ground that the compensation is exorbitant and is not as per the principles laid down by the Hon'ble Apex Court.

20. From the documents on record and from the affidavit of claimant, it appears that he incurred Rs.1,05,000/- towards medical expenses, instruments, attendant charges and further additional expenses to the tune of Rs.2,00,000/- at Khedekar Diamond Hospital, Chembur, Mumbai. Thus total expenses he has incurred is Rs.3,05,000/-. From the salary break up his salary is required to be taken as Rs.27,000/-, which he received in hand. He sustained 20% permanent disability of his right lower limb. Considering his

nature of work, he was required to go to different sites in connection with his duty. It has come in the evidence of AW-7 that the claimant left the job in February 2009, however, no resignation letter is submitted. The deposition is recorded in year 2011, therefore, it would have been possible for this witness to give specific statement of his leaving the job. As such, one cannot conclude that the claimant left the job or not doing anything for earning other than the job which he was pursuing prior to the accident.

21. In view of the judgment of **Raj Kumar** (supra) relied on behalf of Advocate Afonso, one cannot conclude the disability as of the whole body if it is in respect of any particular organ and not of the whole body. Here the claimant sustained 20% disability of right lower limb.

Therefore, in my considered opinion, the functional disability may be of 10% as his job was to visit different sites and install systems. The claimant appears to be hospitalized for around three months and was under treatment for more than one and half year. Till his discharge from Khedekar's hospital on 26.07.2010. Thereafter, also he attended OPD. It has come on record that one months salary was paid to the claimant on his leave. Thus, he suffered loss of around six months salary (including hospitalisation and visits to hospitals) which comes to Rs.1,62,000/-.

22. The learned Counsel for the respondent-claimant relied on **Mr. Aslam Ajgarali Makrani** (supra) and **Kavita** (supra) wherein the Hon'ble Apex Court and Bombay High Court held that efforts should always be made to award

compensation not only for the physical injury and treatment, but, also for the loss of earning and inability to lead a normal life and enjoy amenities. The learned Counsel also relied on **Pappu Deo Yadav** (supra) in support of his contention that even self employed person is entitled for 40% addition towards future prospects.

23. The learned Counsel for the appellant vehemently argued that there is no future loss of earning as the claimant can walk and perform other jobs, however, from the deposition on record it has been established that he was having work of visiting the sites and the Company is in the field of installing systems. So definitely, the claimant may not be able to pursue his job effectively due to his disability.

24. **Smt. Sarla Verma & Others Vs. Delhi Transport Corporation & Another, (2009) 6 SCC 121** can be made applicable. Loss of future earning would be 10% of Rs.27,000/-, which comes to Rs.2,700/-. $\text{Rs.2,700/-} \times 12 \text{ months} = \text{Rs.32,400/-}$ per annum would be loss of future earning. In view of **Sarla Verma** (supra), multiplier of 16 is applied, as he was of the age of 35 years at the time of the accident, the amount would be Rs.5,18,400/-. The claimant is also entitled for addition towards future prospects i.e. 40% of loss of future earning as apparently he will not be able to pursue his job of visiting sites and install systems. Considering the evidence of Prashant Rane, AW-7, he would have better prospects in future, if he would have been continued in service. Thus, the claimant is

entitled for Rs.2,07,360/-. In addition to it, he is entitled for Rs.50,000/- towards loss of amenities and enjoyment in life. The claimant is also entitled for Rs.30,000/- towards pain and suffering as he was required to undergo operation thrice and prolonged treatment.

25. The learned Counsel for the claimant/respondent relied on **National Insurance Company Vs. Ms. Vaishali** (supra) and **Jitendra Khimshankar Trivedi** (supra) in order to submit that the claimant can claim the enhanced and just compensation, even if, the Appeal is filed by the Insurance Company.

26. Thus, in my considered opinion, the claimant is entitled for:

Loss of Salary/Leave	: Rs.	1,62,000
Loss of future earning	: Rs.	5,18,400
Future Prospects	: Rs.	2,07,360
Hospital Expenses	: Rs.	3,05,000
Pain and Suffering	: Rs.	30,000
Loss of Amenities	: Rs.	50,000
TOTAL	: Rs.	12,72,760

27. In the result the following order is passed:

O R D E R

- (1) The Appeal is partly allowed.
- (2) The impugned judgment and award dated 01.03.2012 passed by the learned Claims Tribunal, Panaji in Claim Petition No. 67/2009 is hereby modified as under:
 - (i) The Claim Petition is allowed partly with proportionate costs.
 - (ii) The original respondents shall be liable to pay to the claimant jointly and severally compensation of Rs.12,72,760/- (Rupees Twelve Lakhs Seventy Two Thousand Seven Hundred and Sixty only) (this

includes amount awarded to the claimant under Section 140 of M.V. Act) together with interest at the rate of 9% per annum from the date of filing of the Petition till its realization.

- (3) Award be drawn accordingly.
- (4) If the Insurance Company has already deposited the amount as per the award of the Claims Tribunal, the Insurance Company is entitled to receive the excess amount deposited on and above the amount of compensation awarded in this First Appeal alongwith proportionate interest accrued thereon, if the amount is lying or is in Fixed Deposit with any Bank.
- (5) First Appeal is accordingly disposed off in the aforesaid terms.

M.S. JAWALKAR, J.

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