

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.86 OF 2014

Shri Muneesh Kumar Shakya,
s/o Dharamjeet Shakya,
Age 35 years, Tiles Fitting Contractor,
R/o H.No.139/A, 2nd Daddio,
Behind Government Primary School,
Telaum, Navelim, Salcete Goa.

... Appellant

Versus

1 Shri Damodar S. Asurkar,
s/o Shikant G. Asurkar, major,
r/o H.No.196, Aquem Alto,
Near Pavel House, Margao Goa.

2 The New India Assurance Co. Ltd.,
Jaganath Building, Near Railway Flyover,
Margao Goa.

... Respondents

None for the Appellant.

Mr. E. Afonso, Advocate for Respondent No.2 -Insurance
Company.

CORAM: M. S. SONAK, J

DATED: 17th September 2021

ORAL JUDGEMENT

1. None for the appellant. Mr. E. Afonso for respondent No.2. On 3rd September 2021 since none appeared for the appellant and the respondents the matter was posted on 16/9/2021 under the caption “*for dismissal*”. On 16th September 2021, the same position continued. Therefore, the matter was posted for 17th September, 2021 with a request to the Registry to see if the advocates for the parties can be contacted. The registry could establish contact with the learned Counsel for the respondents, but despite such efforts no contact could be established to the learned Counsel for the appellant. Since this is a matter pertaining to the year 2014, there was no point in adjourning the matter any further.

2. Therefore, I went through the memo of appeal, impugned judgment and award dated 4th September, 2014 and the material on record. I also heard Mr. E. Afonso, the learned Counsel for the respondent-insurance company and now I proceed to dispose of this appeal on merits.

3. The appellant-claimant met with an accident on 17/1/2011 while riding his motor cycle. This accident was with another motor cycle that respondent no.1 owned and was riding. As a result, the appellant sustained injuries and claimed compensation of ₹ 11.00 lakhs with interest. The appellant was 32 years old at the time of the

accident. He was a tiles fitting contractor-cum-tiles fitter earning income of ₹ 12,500/- per month.

4. By the impugned judgment and award, the Tribunal found that the respondent no.1 was negligent and based thereon, directed the respondents to jointly and severally pay compensation of ₹ 1,30,000/-, together with interest at the rate of 9% p.a. from the date of the petition till actual payment.

5. Neither the owner, nor the insurance company have challenged the impugned award. The appellant-claimant has challenged the impugned award *inter alia* on the ground that the finding about contributory negligence was improper and the compensation awarded is less than just compensation.

6. Now the finding on contributory negligence recorded by the Tribunal warrants interference. This finding was recorded only because the appellant allegedly paid the challan amount to the police and further, the appellant did not bother to inquire with the police station the progress regards investigation into the accident. The second reason, according to me, is totally irrelevant. Based thereon, no inference of any negligence could have been drawn against the appellant.

7. As regards the first reason, the challan itself has not been produced on record before the Tribunal. However, assuming that some challan amount was paid by the appellant, in the facts of the present case, the inference of contributory negligence ought not to have been drawn. The material on record establishes that the appellant was originally from Madhya Pradesh (therefore not a local); had studied only upto Standard VIII in Madhya Pradesh (Hindi medium). Therefore, it is possible that the appellant when required by the police to pay against the challan, paid the fine. This, by itself, could not lead to any inference of negligence of contributory negligence.

8. The Tribunal, in this case, framed issues, out of which, issue no.4 read as follows :

4. Whether the claimant proves that he was 32 years old , a tiles fitting contractor cum tile fitter and earning ₹ 12,500/- per month ?

9. The aforesaid issue was answered by the Tribunal in the affirmative. This means that the Tribunal accepted the case of the appellant that he was a tiles fitting contractor-cum-tiles fitter earning ₹ 12,500/- per month. Even, otherwise, the appellant had produced bank records which did indicate his monthly income at the

relevant time at approximately ₹ 10,000/-. However, whilst actually determining the compensation under various heads, this aspect was not fully taken into consideration. This is one of the reasons why the appellant has not been awarded the just compensation.

10. In this case, Dr. N. Barretto (AW.6) deposed that he operated upon the appellant at the Hospicio Hospital, Margao who had sustained fracture injuries to the left tibia and fibula without any neurovascular deficit. He had evaluated him for the percentage of permanent disability on 2.12.2011 and found that he had a physical disability of 2% in the left lower limb as per the Government of Inland, Department of Social Justice and Empowerment Notification, 1981. He duly identified the Disability Certificate Exhibit 51 colly being that drawn by him, clarified that tibia was a load bearing bone but it would not affect the patient, a tile fitter by occupation In his job on account of the 2% permanent disability. He had used the plate and screws for managing the fracture based on the fracture pattern and advised the patient to be ambulatory with the aid of crutches. He corroborated the version of the appellant on the swelling of the ankle and being a common feature in such type of cases with no rebuttal of his testimony

11. True, the doctor has certified the disability of the appellant at 2%. However, the aspect of functional disability does not appear to

have been properly considered. This is because the appellant was admittedly working as tile fitting contractor-cum-tile fitter. He has deposed that his work requires high degree of skill and involves squatting on the floor to actually fit the tiles. There is evidence that after the accident, the appellant had to engage the services of other tile fitters to work along with him. Two such employees have also deposed in the matter. This aspect has also not been considered adequately by the Tribunal.

12. The Tribunal, in this case, has granted only an amount of ₹ 19,200/- towards permanent disability. According to me, this amount, in the facts of the present case, was required to be enhanced to ₹ 1,00,000/-, having regard to the aspect of functional disability. The medical disability percentage may have been 2%. However, the impact of the same on the appellant and his occupation was substantial.

13. Towards loss of income, the Tribunal has awarded compensation of ₹ 50,000/-, taking his monthly income at ₹ 5,000/-. However, if the monthly income were to be taken as ₹ 12,500/- or at least ₹ 10,000/-, then, towards loss of income, an amount of ₹ 1,00,000/- was required to be awarded.

14. The Tribunal, in this case, has ignored the evidence of Dr. Lotlikar (AW.7) that an amount of ₹ 15,000/- to ₹ 20,000/- will have to be spent by the appellant for future operations to remove the metal plates/screws inserted in the tibia. Further, this doctor had also indicated that fees would be payable towards consultation and follow up. Together, compensation of ₹ 25,000/- was due on this account, inclusive of the amount of ₹ 1,105/- awarded by the Tribunal.

15. Towards attending charges, based on the evidence on record, compensation of ₹ 10,000/- was due as against ₹6,750/- determined by the Tribunal. Similarly, as against compensation of ₹ 5,000/- towards travelling expenses, from the evidence on record, compensation of ₹ 10,000/- was due and payable.

16. The compensation towards reimbursement of medical bills and towards pain and suffering, is correctly determined and warrants no interference.

17. Based on the aforesaid, therefore, the total compensation payable to the appellant comes to ₹ 3,07,400/- (Rupees three lakhs seven thousand and four hundred). This according to me, would be the just compensation payable to the appellant based on the evidence on record. Since, the finding on contributory negligence is

set aside, this entire compensation will have to be paid to the appellant.

18. Accordingly, this first appeal is partly allowed and the compensation of ₹ 1,30,000/- as determined by the Tribunal is substituted with the compensation of ₹ 3,07,400/- (Rupees three lakhs seven thousand and four hundred). The rest of the directions i.e. for interest, costs and adjustments are not disturbed. There shall be no order for costs in this appeal. The respondent no.2 to pay this amount to the appellant within 3 (three) months from today.

M. S. SONAK, J.

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