

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.25/2011

MR. SAMSUL ALAM, s/o Abdul
Jalil Mondal, 25 years of age,
Contractor, r/o H.No.174,
Bharatnagar, Sancoale, Mormugao-
Goa.

... APPELLANT

Versus

1. SHRI MOHAN RAJARAM
KAWLEKAR, s/o late Rajaram
Kawlekar, r/o Hansabhat, Mapusa,
Bardez-Goa.

2. THE NEW INDIA ASSURANCE
CO. LTD., Vasco-Goa.

... RESPONDENTS

Mr. V. G. P. Dukle, Advocate *for the Appellant.*

Mr. Amey Kakodkar with Mr. Pankaj Shirodkar, Advocates *for
Respondent No.2.*

CORAM: M. S. SONAK, J.

DATED: 22nd September 2022

ORAL JUDGMENT:

1. Heard Mr. Dukle for the appellant-claimant and Mr. Kakodkar for respondent no.2-insurance company.
2. The challenge in this appeal is to the judgment and award dated 12.11.2010 made by the Motor Accident Claims Tribunal,

South Goa at Margao (Tribunal) in Claim Petition No.194/2009 to the extent the same has denied the appellant-claimant the claimed compensation of ₹3 lakhs together with interest @ 9% p.a. The Tribunal determined the compensation at ₹1,55,680/- but awarded the appellant-claimant compensation of only ₹46,704/- with interest @ 9% p.a. holding that the appellant-claimant contributed to the accident to the extent of 70%.

3. Mr. Dukle, learned counsel for the appellant, submits that the finding about contributory negligence has no support from the evidence on record. He points out that no written statement was filed by the owner/driver of the offending vehicle, no evidence was led, and no questions were posed during cross-examination suggestive of any case of contributory negligence.

4. Mr. Dukle submits that the medical evidence of Dr. Zelio D'Mello (PW8) was not considered in a proper perspective, and his statement that the claimant would have difficulty squatting on the ground and working as a tile fitter was not given adequate consideration. He submits that towards permanent disability, additional compensation of ₹30,000/- should have been awarded because the claimant's functional disability was at least 15 to 20 per cent.

5. Mr. Dukle submits that the claimant's income should be taken at ₹10,000/- and not ₹6,000/-. He submits that the attendant's charges of ₹31,050/- and travelling expenses of ₹18,000/- were unduly denied to the claimant. He submits that the medical evidence also established treatment spread over nine months, and therefore the compensation towards loss of income should have been ₹54,000/- and not merely ₹30,000/-. Based on all this, Mr. Dukle submits that the compensation of ₹2,64,730/- was due and payable to the claimant.

6. Mr. Kakodkar, learned counsel for the insurance company, defends the impugned judgment and award based on the reasoning therein. He submits that the Tribunal has been charitable in computing the compensation and attributing only 70% liability to the claimant. He points out that the claimant came to the Court with a false case that the Tribunal rightly discarded. Finally, he points out that it is the claimant who the independent investigating agencies prosecuted because his negligence was quite evident in this matter.

7. Mr. Kakodkar submits that the claimant did not even have the license to drive the scooter. Accordingly, Mr. Kakodkar submits that this appeal may be dismissed for all these reasons.

8. The rival contentions now fall for my determination.
9. Based on the rival contentions, the following points arise for determination in this appeal:
 - (a) Whether the Tribunal's finding on contributory negligence warrants interference for modification?
 - (b) Whether the compensation amount determined by the Tribunal represents just compensation?
10. On the first point, the record bears out that the accident occurred on 11.07.2009 at about 10.30 a.m., in which the claimant sustained injuries. The claimant has pleaded his version about the genesis of this accident. The Maruti car driver/owner (offending vehicle) did not bother to file any written statement or step into the witness box to explain his version of the genesis of the accident. Therefore, even in the cross-examination, the case of contributory negligence or the absence of negligence on the part of the Maruti car owner/driver was not properly put up. The insurance company also did not examine any independent witnesses regarding the genesis of the accident.

11. At the same time, the record also bears out that the investigating authorities did not think it appropriate to register FIR against the claimant upon investigation. Mr. Dukle admitted that the claimant was prosecuted, though acquitted in the criminal proceedings. The investigating officer was examined in the matter and has deposed to the scene of the accident panchanama.

12. Based on the evidence on record, the Tribunal cannot be faulted for concluding that this was a case of contributory negligence. In *Meera Devi & Anr. v/s. H.R.T.C. & Ors. – (2014) 4 SCC 511*, the Hon'ble Supreme Court has held that there must be cogent evidence to prove contributory negligence. In this case, there is cogent evidence in the form of police investigation papers which were deposed to by the investigating officer (PW7). The version about the Maruti car reversing itself and parking on the other side of the road appears improbable.

13. However, the evidence suggests negligence on the part of the Maruti car driver because this car driver had the opportunity of avoiding the accident upon adopting some reasonable care. In addition, the Maruti car was a weightier vehicle compared to the scooter the claimant was riding. The accident has also taken place in the centre of the road. Therefore, upon evaluating all these

aspects, a contributory negligence case has been made. However, the contribution of the claimant and the car driver to this accident should be adjudged as equal. This is more so because the car driver failed to step into the witness box and explain his version of the genesis of the accident.

14. Accordingly, the finding about contributory negligence recorded by the Tribunal is maintained. However, it is held that the claimant contributed to this accident to the extent of 50% and not 70% as held by the Tribunal.

15. The second point for determination concerns the determination of the quantum of compensation. Again, there is no warrant to interfere with the Tribunal's finding on the claimant's monthly income being in the range of Rs.6,000/-. The Tribunal has evaluated the evidence on record, and this finding appears correct.

16. Mr. Dukle's contention about functional disability being in the range of 15 to 20 per cent, even though the clinical disability was certified at 8%, has merit. Dr. Zelio D'Mello (PW8) deposed about the claimant suffering total permanent disability of the right ankle joint of 8% due to mild limitation and ankle joint movement. But he also stated that a patient with this type of

disability would have difficulty squatting on the ground. Moreover, if a patient works as a tile fitter, it would restrict his movements. In such matters, functional disability is important and based on the same, Mr. Dukle's contention about the award of additional compensation of ₹30,000/- can be accepted.

17. There is evidence about the claimant undergoing treatment both as an inpatient and outpatient for a total period of nine months. The claimant has produced proof of incurring an expenditure of ₹31,050/- towards attendant charges and ₹18,000/- towards travelling costs. There was no reason not to consider awarding these amounts to the claimant.

18. The Tribunal has awarded compensation of ₹30,000/- towards loss of income for six months. PW8 has, however, deposed to treatment spread over nine months. Therefore, under this head, the claimant is entitled to compensation of ₹54,000/-. Thus, Mr. Dukle's case about compensation being determined at ₹2,64,730/- deserves to be accepted. However, since the appellant-claimant contributed to the accident to the extent of 50%, the compensation amount payable to the claimant would come to ₹1,32,365/-.

19. Mr. Kakodkar also submitted that this appeal had been dismissed for non-prosecution in 2012, and restoration was applied only in November 2020. He, therefore, offered that no interest or at least interest at reduced rates may be ordered during this period of eight years. Mr. Dukle, however, pointed out that the appeal had been dismissed for want of prosecution only against the owner/driver and not against the insurance company.

20. In my judgment, on account of the dismissal of the appeal against the owner/driver and its restoration after eight years, the final hearing in this appeal was considerably delayed. Therefore, the insurance company must not be entirely saddled with the liability of payment of interest @ 9% p.a., at least during this delay period. Thus, the equities can be balanced by reducing the interest rate of 7% p.a. payable from the date of the institution of the petition till the actual payment. This reduction, to a certain extent, will compensate the insurance company.

21. Accordingly, this appeal is partly allowed. The compensation amount is enhanced to ₹1,32,365/- together with interest @ 7% p.a. from filing the claim petition till the full and effective payment. The respondents will be jointly and severally liable to pay this amount.

22. Respondent no.2-insurance company, is directed to deposit in this Court the enhanced component of the compensation amount together with interest within six weeks from today after giving due intimation to the learned counsel for the appellant-claimant. Upon deposit, the claimant will be entitled to withdraw this amount after furnishing identification and bank details. The Registry to ensure that the amount is transferred into the account of the appellant-claimant directly.

23. The appeal is partly allowed to the above extent.

24. There shall be no order for costs.

M. S. SONAK, J.