Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 7 OF 2017
WITH
MISC. CIVIL APPLICATION NO. 27 OF 2017
AND
FIRST APPEAL NO. 8 OF 2017
WITH
MISC. CIVIL APPLICATION NO. 28 OF 2017

National Insurance Company Limited, having office at Div. No.10, Flat No.101 to 106, N-1, B.M.C. House, Connought Place, New Delhi 110001, having its Branch at First Floor, Town Centre, Bicholim. …. Appellant-Applicant.

Versus.

1. Mahadev Keshav Advaikar (since deceased)

1(a) Smt. Manorama Mahadev Shet Adwalkar alias Adwaikar,

1(b) Mayur Mahadev Shet Adwaikar alias Adwalkar,

1(c) Manjita Mahadev Shet Adwaikar alias Adwalkar,
All r/o. H.No. 230, Kumbhar Wada, Mayem, Bicholim, Goa 403504.

2. Rama Z. Rane,

s/o. Zingo Rane, aged 39 years, service,
Indian National, r/o. H.No.399, Arunne
Wada, Parye, Sattari, Goa. ..... Respondents.

Mr. Amey Jagdish Sinai Kakodkar, Advocate *for the Appellant-Applicant.*

Mr. Vibhav Amonkar, with Mr. K. Sabnis, Advocates *for Respondents No.1(a) to 1(c)*

Mr. Deepak Gaonkar, Advocate *for Respondent No.2.*

WITH
STAMP NUMBER (APPLICATION) NO.881/2020 (F)
IN
FIRST APPEAL NO.8/2017

Chittaranjan Vaman Phadke
s/o. Late Vaman Pandurang Phadke
aged 64 years, Indian National and,
r/o. H.No.288, Bhatiwadi,
Mayem, Bicholim, Goa 403504. .... Applicant.

Versus

1. Mahadev Keshav Advaikar
(since deceased)
1(a) Smt. Manorama Mahadev
Shet Adwalkar alias Adwaikar,
1(b) Mayur Mahadev Shet
Adwaikar alias Adwalkar,
1(c) Manjita Mahadev Shet
Adwalkar alias Adwaikar,
All r/o. H.No. 230,
Kumbhar Wada, Mayem,
Bicholim, Goa 403504.

2. National Insurance Company
Limited, having office at
Div. No.10, Flat No.101
to 106, N-1, B.M.C. House,
Connought Place, New Delhi 110001,
having its Branch at First Floor,
Town Centre, Bicholim. ….. Respondents.

Mr. Deepak Gaonkar, Advocate *for the Applicant.*

Mr. Vibhav Amonkar, with Mr. K. Sabnis, Advocates f*or Respondents No.1(a) to 1(c)*

Mr. Amey Kakodkar, Advocate *for Respondent No.2.*

CORAM : M. S. SONAK, J.

DATE : 17th JUNE 2022.

ORAL JUDGMENT: -

1. Heard Mr. Amey Kakodkar for the Insurance Company in both these Appeals and Mr. Deepak Gaonkar for Respondents No.2 -Claimants in both these Appeals. In addition, Mr. Vibhav Amonkar appears for the legal representatives of driver Mahadev Advaikar.

2. The learned Counsel for the parties agree that both these Appeals can be disposed of by a common Judgment and Order because the two Awards disposed of the Claim Petitions that arose from the accident dated 22/6/2010, in which the Claimants, who were traveling/riding a Bajaj Chetak scooter, were injured.

3. The challenge in First Appeal No.7/2017 is to the Award dated 30/9/2015 in Claim Petition No.46/2014. The challenge in First Appeal No.8/2017 is to the Award dated 30/10/2015 in Claim Petition No.23/2013.

4. In First Appeal No.7/2017, the Tribunal has awarded the Claimant compensation of ₹ 3,63,100/-, along with interest at the rate of 9% per annum. In first Appeal No.8/2017, the Tribunal has awarded the Claimant a compensation of ₹2,11,438/-, along with interest at the rate of 9% per annum.

5. Mr. Kakodkar submits that the Award of ₹2,50,000/- towards pain and suffering, loss of happiness, and amenity to the Claimant in Claim Petition No.7/2017 is excessive and by no means justifies it. He submits that even the Award of ₹1,00,000/- lakh towards loss of marriage prospects is unjustified because the injuries suffered by the Claimant had not hampered his marriage prospects.

6. Mr. Kakodkar submits that the Award of ₹1,50,000/- towards pain and suffering to the Claimant in First Appeal No.8/2017 is also excessive.

7. Mr. Kakodkar submits that in both these matters, the Appellant has taken out applications under Order 41, Rule 27 of the C.P.C. seeking to adduce additional evidence. He submits that this additional evidence, now procured from the Assistant Director of Transport, establishes that on the date of the accident *i.e.* 22/6/2010, the driver of the vehicle, Mahadev Advalkar, did not possess a licence. He submits that this amounts to a fundamental breach of the insurance policy and consequently exonerates the insurance company from the liability to pay. In the alternate, Mr. Kakodkar submits that an order for pay and recovery could be made by accepting this additional evidence. He relies on ***Sanjay Kumar Singh vs. State of Jharkhand***[1] to explain the scope of Order 41, Rule 27 of the C.P.C.

8. Mr. Deepak Gaonkar and Mr. Vibhav Amonkar learned Counsel for the Claimants and the legal representatives of the driver Mahadev contest the contentions of Mr. Kakodkar. They submit that Mahadev died during the pendency of the claim petition before the Tribunal. They submit that there is absolutely

1. 2022 SCC OnLine SC 292

no explanation for the delay and the lack of due diligence on the part of the insurance company is apparent. Finally, they submit that admission of additional evidence, at this point in time, would operate harshly against the legal representatives of Mahadev. They rely on ***New India Assurance Co. Ltd. vs. Mohinder Dev and ors.***[2] where, in the context of a claim under the Motor Vehicles Act, the Delhi High Court dismissed an application under Order 41, Rule 27 of the C.P.C.

9. Mr. Gaonkar submits that the compensation amount awarded by the Tribunal is, by no means, excessive. He submits that the Claimant in First Appeal No.7/2017 has suffered permanent disability of the right lower limb due to stiffness of the right knee. This disability is assessed at 50%. He, therefore, prays that both these Appeals be dismissed.

10. The rival contentions now fall for my determination.

11. In First Appeal No.7/2017, although the Tribunal has made a composite award of ₹2,50,000/- towards pain and suffering, loss of happiness, and loss of amenity. However, from the discussion, it is quite clear that the awards under the heads of pain and suffering and loss of amenity have been considered

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2. AIR 2008 De 116.

separately. Even otherwise, the head of pain and suffering or loss of happiness is a distinct head from the loss of amenity.

12. The evidence on record establishes that the Claimant in First Appeal No.7/2017 has indeed incurred a permanent disability of the right lower limb due to stiffness of the right knee. The medical evidence has assessed this disability at 50%. There is also evidence that the Claimant had to be admitted to the hospital twice and undergo two operations. All this certainly justifies the compensation of at least ₹1,50,000/- towards pain and suffering and another ₹ 1,00,000/- towards loss of amenity. Thus construed, there is no case to interfere with the Award towards pain and suffering and loss of amenity.

13. Again, the Award of ₹1,00,000/- towards loss of marriage prospects, though on slightly higher side, in the facts and circumstances of the present case, is not disproportionately excessive. The Tribunal has exercised its discretion, and the exercise is neither unreasonable nor disproportionate. Furthermore, the Tribunal has made a very paltry award towards medical expenses of ₹13,100/-. Thus construed, there is no case made out to interfere with the overall amount of ₹3,63,100/- awarded by the Tribunal.

14. In First Appeal No.8/2017, only an amount of ₹1,50,000/- has been awarded towards pain and suffering and an amount of ₹61,438/- towards medical expenses. Here again, the medical evidence establishes that the Claimant suffered a fracture of the midshaft right humerus and midshaft right radius/ulna. His percentage of disability was assessed at 15%. Furthermore, there is evidence that this Claimant was admitted on 22/6/2010 itself and operated on 23/6/2010. He was discharged on 26/6/2010. Considering all these aspects, the Award of ₹2,11,438/- cannot be said to be excessive.

15. Admittedly, driver Mahadev expired during the pendency of the proceedings before the Tribunal. His legal representatives *i.e.* widow and the children, were brought on record. Then, no steps were taken by the Insurance Company to make good their defence about Mahadev not possessing any licence on the accident date.

16. The impugned awards were made on 30/09/2015 and 30/10/2015. It is only on 14/1/2016 that the Insurance Company applied for information from the Assistant Director of Transport, and such information was apparently furnished on 21/1/2016. Such information, by itself, may not be evidence. Legal representatives of Mahadev were denied the opportunity to contest this information. There is not a whisper about what prevented the Insurance Company from seeking such information earlier and leading proper evidence before the Tribunal. In the precise context of claim petitions, the Delhi High Court declined to exercise its discretion and permit the Insurance Company to lead additional evidence at the appellate stage in the absence of exercise of due diligence.

17. ***Sanjay Kumar Singh*** (supra), was not delivered in the context of claim petitions for vehicular accidents. Even, this decision holds that the true test is whether the appellate Court can pronounce judgment on the materials before it without considering the additional evidence sought to be adduced. In the peculiar facts of this case, considering that the driver Mahadev died several years ago, the exercise of any discretion in favour of the Insurance Company will not be appropriate. This is more so because there is an absence of diligence on the part of the Insurance Company.

18. For all the above reasons, both these Appeals are liable to be dismissed and are, hereby, dismissed.

19. The Claimants will now be entitled to withdraw the amounts deposited by the Insurance Company in this Court, together with interests that shall have accrued on such amounts. In addition, the Claimants to furnish their bank details so that the Registry can make transfers directly into their bank accounts.

20. Misc. Civil Applications for additional evidence are disposed of. Similarly, the compensation withdrawal application no longer survives and is also disposed of.

21. The Appeals and the Misc. Applications are disposed of in the above terms.

22. There shall be no order for costs.

M. S. SONAK, J.

SANTOSH S MHAMAL Digitally signed by SANTOSH S MHAMAL Date: 2022.06.20 11:01:54 +05'30'