

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.32 OF 2016

1. HDFC ERGO General Insurance Co. Ltd.,
First Floor, Magnum Center,
M. G. Road, Panaji Goa,
through its Authorized signatory
Mr. Deepak Fadnavis.
2. Mr. Suresh Kundaikar,
Son of Shri Vishnu Kundaikar,
Age 38 years,
Resident of H.No.141, Gauthan,
Bhoma, Ponda Goa. ... Appellants

Versus

1. Mr. Pandhari Kanta Naik (Since deceased)
son of Kanata Naik,
Age 48 years,
Resident of H.No.866, Gudi Wada,
Neura, Ilhas Goa.
1(A) Smt. Pratima Pandhari Naik,
Widow of Pandhari Kanta Naik,
R/o H.No.866, Gudi Wada,
Neura, Ilhas, Goa and her two children.
1(B) Kum. Yukta P. Naik,
16 years of age,
R/o H.No.866, Gudi Wada,
Neura, Ilhas Goa.
1(C) Mast. Pratik P. Naik,
12 years of age,
r/o H.No.866, Gudi Wada,
Neura, Ilhas Goa.
2. Mr. Sameer Kundaikar,
Son of Shri Mukund Kundaikar,
Aged about 39 years old,

Resident of H.E-74, Gauthan,
Bhoma, Ponda Goa.

...Respondents

Mr. Vaman Kurtikar, Advocate for the appellants.

Mr. A. D. Bhobe and Ms. K. Govenkar, Advocates for the respondents.

CORAM: M. S. SONAK, J

DATE : 24th February 2022

ORAL JUDGMENT

1. Heard Mr. Vaman Kurtikar, learned counsel for the appellants, and Mr. A. D. Bhobe learned counsel for the respondents- claimants.

2. This appeal challenges the judgment and award dated 28.10.2015 made by the Motor Accident Claims Tribunal, Panaji (Tribunal) in Claim Petition No.47/2014 awarding the claimant compensation of ₹15,99,685/- together with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization.

3. Mr. Kurtikar learned counsel for the appellants at the outset submitted that the appellants were restricting the challenges in this appeal to the quantum of compensation awarded. He submitted that there is no evidence whatsoever to establish that the claimant was employed as a heavy vehicle driver by CRG Marketing or any other employer. He points out that the certificate produced by the claimant was dated 01.02.2014 when the accident, in this case, took place on

16.06.2011. He submitted that there are inherent inconsistencies in the deposition of Cajetan George (AW4), the alleged employer. He pointed out that no order of appointment was produced nor were any salary certificates for the period between 2008-2011 produced. He pointed out that the wage register was not produced and there is no reflection of any payment in the income tax returns, which in any case were not produced. He pointed out that even the license for driving the heavy vehicle was not produced. He submitted that despite all these lacunae the tribunal ought not to have accepted the claimant's case about his monthly income being ₹8000/- per month or that the claimant was indeed employed as a heavy vehicle driver.

4. Mr. Kurtikar without prejudice to the aforesaid submitted that the tribunal, in this case, has awarded overlapping amounts under substantially the same heads. He pointed out the errors in the chart at para 28 of the impugned award to submit that grossly excessive compensation has been awarded.

5. Mr. Kurtikar also pointed out that Dr. Zelio D'Mello (AW7) who issued a disability certificate and deposed in the matter had made it clear that the disability was only to the extent of 15% on the ALIMCO Scale. He however states that AW7 deposed that the claimant was in a position to undertake normal duties and lead a normal life. He submitted that despite all this evidence, the tribunal has virtually proceeded on the basis that the claimant suffered 100%

disability. He submitted that this is either legal or proper and the determination of compensation warrants interference.

6. Mr. Bhobe learned counsel for the claimant submitted that there is no error in the impugned award. He submitted that AW4 had made it clear that he was a small-time businessman and therefore, there is nothing unreasonable for him not to issue any appointment order or maintain any register. He submitted that no questions about driving license were even posed to the claimant or his employer in the course of cross-examination. He, therefore, submits that the income of the claimant was correctly taken as ₹8000/- per month.

7. Mr. Bhobe submitted that though the certificate had indicated 15% disability, AW7 had deposed that with this disability the claimant would not be in a position to function as a heavy vehicle driver or for that matter as a driver. He submitted that in such circumstances the tribunal was justified in taking overall disability as 100%.

8. Mr. Bhobe submits that the compensation has been correctly determined by the tribunal and therefore, this appeal may be dismissed.

9. The rival contentions now fall for my determination.

10. The first aspect to be considered is the employment and earnings of the claimant who admittedly suffered an accident on

16.06.2011 and suffered injuries as set out in the certificate dated 04.07.2014 issued by AW7.

11. The claimant has himself deposed that he was employed with CRG Marketing as a heavy vehicle driver and was earning ₹8000/- per month. The claimant also examined his employer Cajetan George as AW4. He has also deposed about the claimant being employed with him as a heavy vehicle driver. In the cross-examination, AW4 stated that the business commenced in the year 2008 and since then the claimant was working with him.

12. AW4 in his cross-examination also maintained that he has a sales tax license to show that he is in the business. He has also stated that since his business is not a large-scale business he is not maintaining a register and that he has not issued any appointment letter to the claimant. AW4 also stated in his evidence that due to the accident the claimant himself informed him that he was not in a position to drive or put stress on his right knee and therefore the claimant stopped attending duties.

13. If the evidence on record on the aspect of employment and salary is perused and assessed then there is no reason to disbelieve the case of the claimant that he was indeed employed as a heavy vehicle driver with CRG Marketing and was earning ₹8000/- per month. In the cross-examination, no questions were posed about the claimant not possessing any license to drive heavy goods vehicles. The evidence

of Cajetan George (AW4) inspires confidence and the mere fact that no appointment letter was issued or no register was maintained is not a good enough ground to doubt the deposition of AW4. Therefore, no fault can be found with the tribunal holding that the claimant was indeed employed as a heavy vehicle driver and was earning ₹8000/- per month at the time of the accident.

14. But if the determination of compensation made by the tribunal is perused then, Mr. Kurtikar is right that the tribunal, in this case, has virtually proceeded on the basis that the claimant expired in the accident or that the claimant incurred 100% disability. Mr. Kurtikar is quite justified in his criticism of this aspect.

15. Dr. Zelio D'Mello (AW7) issued a disability certificate dated 04.07.2014 in which he has certified the following:

“This is to certify that Shri Pandhari Kanta Naik, 51 years old, male patient, GMC Hospital No. MLC 11/4513 was admitted to Orthopaedic surgery ward of Goa Medical College, Bambolim, on 16/06/2011, following an alleged vehicular accident with:

1. Grade IIIB compound Bicondylar fracture right tibia.

As an emergency procedure on 17/06/2011 wound was debrided and fracture Bicondylar tibia fixed with 2 cancellous screws and knee spanning external fixator. He was admitted to ward-103 on 7/7/2011 skin grafting carried out. On 16/7/2011 he was discharged from the ward. He attended the OPD for regular follow up and physiotherapy.

Shri Pandhari K. Naik was evaluated in Ortho Surgery OPD, for percentage of permanent disability on 26th June 2014. On examination clinically & radiologically Bicondylar fracture right tibia has united. There are two cancellous screws in situ. There is a moderate limitation of movement of the right knee joint. The percentage of permanent disability according to ALIMCO scale amounts to 15% (Fifteen Percent) of the right lower limb due to stiffness of the right knee joint.”

16. AW7 deposed to the aforesaid certificate dated 04.07.2014. In his deposition, AW7 stated that the percentage of permanent disability assessed on 26.06.2014 according to the ALIMCO Scale is 15% due to the stiffness of the right knee joint. In his cross-examination, AW7 accepted that the claimant must have undergone physiotherapy for six months. He also accepted that the claimant can work but will have difficulty in climbing steps, squatting on the ground and further will not be able to drive heavy goods vehicles. AW7 deposed that except driving, the claimant can undertake other works like a clerical job or even carry on some business. AW7 also clarified that the disability is not for the entire body but only to the part of the body i.e. right knee joint. AW7 however maintained that the claimant will not be in a position to drive heavy goods vehicles.

17. Now assessing the evidence of AW7 on the aspect of disability, it is true that the claimant on account of the injuries sustained by him in the accident, would not be in a position to drive heavy vehicles. Therefore, to a certain extent, Mr. Bhobe is correct in his submission

that the percentage of disability cannot be taken as only 15% because, on account of this disability, the claimant would not be in a position to work as a heavy vehicle driver which is what he was employed for. However, Mr. Bhobe is not right in his submission that the disability should be taken as 100%.

18. On the assessment of evidence on record including in particular, the evidence of AW7 Dr. D'Mello to my mind the percentage of disability in so far as the claimant is concerned can be taken at 50%. This is because the claimant was 48 years old at the time of the accident and at that stage, it would be rather difficult for him to switch to undertake any business or such other vocation. No doubt, having regard to the nature of the disability suffered, it is not as if the claimant was not in a position to undertake any clerical job or to earn some amount for himself and his family. Therefore, on this aspect, the disability can be taken as 50% but not 15% as suggested by Mr. Kurtikar and also not 100% as suggested by Mr. Bhobe.

19. The just compensation, in this case, will therefore have to be determined based on the following two premises:-

(a) that the claimant was indeed employed as a heavy vehicle driver or earning ₹8000/- per month;

(b) that overall disability suffered by the claimant on account of injuries in the accident can be taken at 50%.

20. Now if the income of the claimant is taken as ₹8000/- per month then in terms of the decision of the Hon'ble Supreme Court in *National Insurance Company Ltd. Vs Pranay Sethi*¹, an addition of 25% will have to be made towards future prospects. [See para 59.4 of *Pranay Sethi* (supra)]. This means that the monthly income of the claimant will have to be taken as ₹10,000/-. Since the claimant's age was 48 years at the time of the accident, the multiplier will be 13. This means that the compensation towards loss of future income would come to ₹7,80,000/- (since disability is to be taken as 50%).

21. The award of compensation of ₹6160/-, ₹4400/- and ₹2725/- towards medical expenses, attendant charges, and transport expenses warrants no interference. Similarly, the award of compensation of ₹1,00,000/- towards mental shock, pain, and sufferings, agony also warrants no interference. The award of ₹1,00,000/- towards future medical expenses, attendant charges, and transport charges also warrants no interference.

22. The award of ₹96,000/- towards loss of income during hospitalization, physiotherapy treatment will have to be deleted since this is subsumed under the first head itself. However, there is evidence that the claimant underwent physiotherapy for almost six months and besides, he would have to undergo follow-up treatment and physiotherapy for a further six months. There is also evidence about the operation that the claimant had to undergo. Therefore, though the

¹ 2017(16) SCC 680

award towards loss of income is deleted because the same is subsumed under the first heading itself, an award of ₹1,00,000/- is due to the claimant for all these expenses.

23. The award for notional earnings for an amount of ₹4,32,000/- has no legs to stand on. There is no explanation in the impugned award as to how this compensation was awarded. The award towards future income also stands included in the compensation now determined against the first head of loss of future income by taking into account the future prospects. Therefore, the award to this extent also warrants interference.

24. Thus, the just compensation, in this case, works out to ₹10,93,285/- which can be safely rounded to ₹11,00,000/-.

25. Though, the interest awarded is on the higher side in the peculiar facts of the present case, the same is not disturbed now that the compensation amount is being scaled down.

26. This appeal is therefore partly allowed and the just compensation is now determined as ₹11,00,000/- in place of the earlier determination made by the tribunal in the impugned award. The rest of the directions in the impugned award are not interfered with.

27. The appellants as well as the respondents will be entitled to withdraw the proportionate amount from the deposit made by the appellants in this Court. The parties will also be entitled to the proportionate interest. The registry to facilitate the withdrawals. The compensation amount will have to be directly deposited in the accounts of the respondents based on the bank details to be supplied.

28. The appeal is partly allowed in the aforesaid terms. There shall be no order for costs.

M. S. SONAK, J