

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.41 OF 2018

Bajaj Allianz General Insurance Co. Ltd.,
3C-3D, Sesa Ghor,
20 Patto Plaza, Panaji Goa,
Through its Authorized signatory,
Mr. Nilesh Gandhi.

... Appellant

Versus

1 Smt. Usha Kiran sai Kulkarni,
Wife of Mr. Kiransai Kulkarni,
Age 63 years old, married,
Resident of "Sai Santoshi", Joefil Nagar,
Ponda Goa.

2 Mr. Sanjay Shantaram Sangodkar,
H.No.36, Near Central Hospital,
Tisca, Usgao-Goa.

3 [Mr. Kailash Rati Mahato,
Ganeshpur, Topchanchi (DHN),
Byepass Road, Chas Bokaro,
Jharkhand.] – Deleted.

... Respondents

Mr Amey Kakodkar and Mr P. Shirodkar, Advocates for the
Appellant.

Mr P. Faldessai and Ms V. Shetye, Advocates for Respondent No.1.

CORAM: M. S. SONAK, J.

DATED : 6th OCTOBER 2022

ORAL JUDGMENT:

1. Heard the learned counsel for the parties.
2. This appeal is directed against the judgment and award dated 09.08.2016 in Claim Petition No.18/2012. Accordingly, the Tribunal has awarded the claimant the compensation of ₹13,83,019/- towards the injuries suffered by her in the accident that occurred on 15.08.2009.
3. Mr Kakodkar submits that the evidence on record was insufficient to return a finding that the truck driver of the insured vehicle was rash and negligent. He presents that the driver of the car in which the claimant was travelling did not step into the witness box. Even the claimant did not step into the witness box. Only her husband, in the back seat, stepped into the witness box as a power of attorney holder. He submits that no finding of rashness and negligence could have been reached based on the husband's evidence.
4. Mr Kakodkar submits that in the alternate, this is a case of composite negligence between the car driver and the truck driver. Further, he submits that since the car was owned by the claimant's husband at least 50% liability must be borne by the car driver and the claimant's husband.
5. Mr Kakodkar submits that even the quantum of compensation is excessive and does not represent just compensation. He referred to

the evidence of the claimant's husband and the Chartered Accountant to point out that the claimant's income had increased many folds after the accident. As such, there was no justification to award ₹9,00,000/- towards loss of income. He submits that the award of ₹1,00,000/- towards disability and ₹9,00,000/- towards loss of income amounts to duplication and overlapping.

6. Mr Kakodkar submits that no doctor was examined; therefore, the finding about 26% disability is based on no evidence on record.

7. For all these reasons, Mr Kakodkar submits that this appeal should be allowed and the impugned award be set aside.

8. Mr Faldessai defends the impugned award based on the reasoning therein. First, he submits that the finding about rashness and negligence is based on evidence on record. Second, he submits that the truck driver did not step into the witness box; therefore, the adverse inference was rightly drawn against him. Third, he submits that the truck was a weightier vehicle and additional duty of care was expected while driving in Anmod Ghat. He, therefore, submits that the finding on rashness and negligence warrants no interference.

9. Mr Faldessai submits that the compensation determined is fair and proper. He submits that though the loss of income was to the extent of ₹19,00,000/- per annum, the Tribunal has taken this loss at only ₹1,00,000/- per annum. He submits that no compensation has

been awarded for the loss of expectation of life, discomfort and inconvenience.

10. For all these reasons, he relies on *Raj Kumar Vs Ajay Kumar and Another*¹ and *Rajendra Datta Halarnkar and Another Vs Deepali Dinesh Halarnkar*² in support of his contentions.

11. The rival contentions now fall for my determination.

12. Upon due consideration of rival contentions and the material on record, the following two points arise for determination in this appeal.

(a) Is the finding of rashness and negligence on the truck driver's part sustainable?

(b) Whether the Tribunal correctly determines the quantum of compensation?

13. On the issue of rashness and negligence, the record bears out that while the claimant's husband, who was in the car at the time of the accident, has deposed to the genesis, the truck driver failed to step into the witness box. Secondly, based on their investigation, the independent investigating agency filed an FIR against the truck driver, not the car driver in which the claimant and her husband were travelling.

14. The claimant's husband (AW1) has deposed not only as a witness to the accident but also as a power of attorney holder for the

¹ (2011) 1 SCC 343

² 2022 SCC OnLine Bom 291

claimant. He has produced on record the FIR, complaint and panchanama. He denied the suggestion of contributory or composite negligence. From his cross-examination, nothing was elicited that could benefit the Appellant.

15. Aneesamed Mujawar (AW3) was the Police Inspector who conducted the investigations deposed to the booking of the truck driver for the offences under Sections 279 and 337 of the Indian Penal Code. He deposed that the car driver Damodar Naik was the complainant, and he even identified him. He deposed to the panchanama and the other investigation documents.

16. The Tribunal, upon considering the oral and documentary evidence on record, found that the accident was caused due to the negligence of the truck driver. This finding is borne out from the evidence on record. The additional circumstances, like the failure of the truck driver to depose and the fact that even the police authorities thought it appropriate to file an FIR against the truck driver, are sufficient to sustain this finding. Ultimately, such a finding has to be arrived at on the touchstone of preponderance of probability and not beyond a reasonable doubt.

17. Thus, Mr Kakodkar's first contention will have to be rejected, and the Tribunal's finding on the rashness and negligence will have to be sustained.

18. On the issue of the quantum of compensation, the claimant has not herself stepped into the witness box, but her husband deposed *inter alia* as power of attorney.

19. The pleadings and the deposition speak about the claimant being a director of the company Fiemench Perfumes (India) Pvt. Ltd. The husband (AW1) deposed that he is the Managing Director of this company. However, he did not depose about the precise role of the claimant in the functioning of this company. Instead, he deposed about investments made by this company in another proprietary concern involved in film production.

20. AW1 deposed that the claimant had suffered 28% disability along with mental trauma due to her domestic, social, and professional life. He stated that the claimant could not depose herself because she could not stand for a long time. He deposed about investments in M/s. Sai Santoshi Films by Fiemench Perfumes Pvt. Ltd.

21. AW1, in his cross-examination, admitted that after the accident on 15.08.2009, the total gross income of the claimant for the Assessment Year 2010-2011 was ₹11,69,577/-. For the Assessment Year 2011-2012, this increased to ₹28,45,951/-. For the Assessment Year 2012-2013, this gross income increased to ₹36,11,049/-. For the Assessment Year 2012-2013, the claimant's gross income was ₹35,58,065/-. He added that the income increase from Fiemench Perfumes Pvt. Ltd., and not M/s. Sai Santoshi Films.

22. The Chartered Accountant - Shridhar P. Bhat (AW4), who deposed to in this matter, also confirms the above figures deposed to by the claimant's husband (AW1). He deposed that the claimant's salary increased after the accident in 2014. He only stated that the current year's salary for the claimant was reduced. However, he did not specify what the reduction was or whether the said reduction had any nexus with the accident that had taken place five years before the reduction.

23. The income tax returns are produced on record. Unfortunately, though the claimant's husband and the power of attorney holder deposed to 28% disability, no doctor was examined. However, the Tribunal has accepted a medical certificate on record.

24. Now even if this Court had to proceed based on the disability certificate, the evidence on record shows that even after the accident, there was no serious loss as such in the claimant's earnings. In fact, the earnings went on increasing. Merely because the earnings might have dropped almost five years after the accident, there is no evidence about the nexus between such dropping and the accident. The extent of reduction was also not deposed to by AW4.

25. Thus, the award of ₹9,00,000/- towards loss of income appears to be on the higher side. The Tribunal, on an ad-hoc basis, has taken the loss of income at ₹1,00,000/- per annum and then applied the multiplier of 9 considering the claimant's age of 58 years at the time of the accident. Based on the evidence on record, the loss could have

been taken at a maximum of ₹50,000/- per year. This loss is because if there was no accident, the claimant might have earned this amount over and above the periodic increase as reflected in the returns and confirmed in the deposition of AW1 and AW4. Thus, towards the loss of income, the compensation that could have been awarded would be ₹4.5 lakhs and not ₹9.00 lakhs.

26. There is evidence of injuries and the consequent disablement suffered by the claimant. Although no doctor was examined, the medical certificate was produced. Considering the cross-examination, it does appear that the percentage of disability was not seriously questioned. Thus, towards the permanent disability, the compensation of ₹1,50,000/- seems appropriate and not merely ₹1,00,000/- as awarded by the Tribunal.

27. Further, in this case, the compensation was due towards the loss of expectation of life as provided in *Raj Kumar* (supra). Therefore, no award has been made even though the claimant suffered permanent disability to the extent of 26% to 28% and was 58 years old at the time of the accident. Therefore, the compensation of ₹1,00,000/- is due under this head. Similarly, in terms of the law in *Raj Kumar* (supra), the compensation of ₹75,000/- should have been paid for the discomfort and inconvenience of life.

28. Thus, the total compensation, in this case, could have been determined at ₹16,58,019/-. Out of this, an amount of ₹5,00,000/- is required to be deducted because this amount was already received by

the claimant as discussed in the Tribunal's order. The total compensation payable is thus determined at ₹11,58,019/-. The interest awarded by the Tribunal warrants no interference because the accident occurred on 15.08.2009.

29. The appeal is therefore partly allowed, and the compensation amount is reduced from ₹13,83,019/- to ₹11,58,019/- together with interest at the rate of 9% per annum from the date of the claim petition till the actual payment.

30. The Appellant will be entitled to withdraw from the deposited amount, the compensation as determined above, and interest at the rate of 9% per annum from the date of the claim petition. In addition, the claimant will also be entitled to the interest accrued on the deposited amount. For this, the claimant will have to furnish the identification documents and bank details so that the registry can directly transfer the amount into the claimant's bank account. Then, the balance amount can be withdrawn by the Appellant – Insurance Company.

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

32. There shall be no order for costs.

M. S. SONAK, J.