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IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.2 OF 2022

MR. BHIVA KAPOLKAR
& ANR. ....APPELLANTS

Versus

MR. ARMANDO DA COSTA ....RESPONDENT

Mr Rohan Rama Dessai, Advocate *for the Appellants.*

Mr Abhijeet Kamat, Advocate *for the Respondent.*

CORAM: M. S. SONAK, J.

DATE : 2nd DECEMBER 2022

ORAL ORDER :

1. Heard Mr Rohan Dessai for the appellants and Mr A. Kamat for the respondent–claimant.

2. At the request of and with the consent of the learned Counsel for the parties, the matter is taken up for final disposal.

3. The appeal is directed against the judgment and award dated 08.04.2021 in Claim Petition No.82/2017, by which the Tribunal has awarded the claimant compensation of ₹6,17,000/-

towards injuries/disablement suffered by the respondent in a vehicular accident on 02.06.2016.

4. At the outset, Mr Dessai, the learned Counsel for the appellant, made it clear that this appeal was restricted to the quantum of compensation awarded by the Tribunal. He submitted that the compensation awarded is excessive and amounts to a bonanza because the Tribunal failed to appreciate the distinction between medically certified disability and functional disability. He submitted that merely because the medical evidence certified 30% permanent facial disability and 5% permanent disability of the lower limb, the Tribunal was not justified in determining compensation based upon a disability of 35%. He submits that such an approach contradicts the law in ***Raj Kumar V/s. Ajay Kumar and Anr.***[1].

5. Mr Dessai submits that the Tribunal failed to undertake the exercise of determining functional disability. He submits that the Tribunal failed to appreciate that the claimant, on account of his facial disability, was not at all inconvenient or disabled in discharging his duties as food and beverages in charge. Mr Dessai, without prejudice, therefore submitted that the disability could be taken at a maximum of 5% and based thereon, the compensation

1 2011 1 SCC 343

amount would come to ₹2,21,000/-. He pointed out that the appellant, who is only a labourer engaged in painting, deposited an amount of ₹3,00,000/- before this Court.

6. Mr A. Kamat, the learned Counsel for the respondent – claimant submits that the Tribunal has correctly determined the percentage of disability. He submits that the Tribunal, however, erred in taking the respondent's income at only ₹10,000/- per month. He submits that there was evidence about the respondent working abroad as food and beverages in charge, and there was no cross-examination about his earnings.

7. Mr A. Kamat referred to ***Jithendran V/s. New India Assurance Co. Ltd. And Anr.***[2] to submit that the impact upon the victim's lifestyle due to disablement suffered in an accident must be considered. Further, he relied on ***Sunita and Ors. V/s. Rajasthan State Road Transport Corporation and Ors.***[3] to submit that pleadings in such matters should not be construed identically, and the Tribunal must appreciate the difficulties for claimants to produce witnesses.

2 2021 SCC OnLine SC 983

3 2020 13 SCC 486

8. Based upon all this, Mr Kamat submitted that this appeal should be dismissed but only after enhancing the compensation amount suitably.

9. The rival contentions now fall for determination.

10. The Tribunal, in this case, has taken cognizance of the medical evidence that had certified 30% permanent facial disability and 5% permanent disability to the lower limb. After that, the Tribunal mechanically added the two disability figures to conclude that the total disability suffered by the respondent comes to 35%. Therefore, the compensation amount has been determined on such basis about the respondent suffering a disability of 35%. The approach of the Tribunal in mechanically adding the two disability figures is contrary to the law laid down in *Raj Kumar* (supra), relied upon by Mr Dessai for the appellant and *Jithendran* (supra), relied upon by Mr A. Kamat for the respondent.

11. In both decisions, the Hon'ble Supreme Court has held that where the claimant suffers a permanent disability due to injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. Therefore, the

Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most cases, the percentage of economic loss, that is, the percentage of loss of earning capacity arising from a permanent disability, will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced shows 45% as permanent disability, will hold that there is a 45% loss of future earning capacity.

12. In most cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in an award of either too low or too high a compensation. Therefore, what requires to be assessed by the Tribunal is the effect of permanent disability on the earning capacity of the injured. After assessing the loss of earning capacity in terms of percentage of income, it has to be quantified in terms of money to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency).

13. Therefore, in this case, applying the law laid down in *Raj Kumar* (supra) and *Jithendran* (supra), it is necessary to determine the effect of permanent disability on the earning capacity of the injured. In other words, in such matters, what is important is the functional disability and not merely the percentage of medical disability that may have been certified.

14. To ascertain the effect of permanent disability on the actual earning capacity, the Hon'ble Supreme Court in *Raj Kumar* (supra) has proposed three steps. In this regard, reference to paragraphs 13 & 14 is relevant. Paragraphs 13 & 14 read thus:

> *"13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on*

some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred per cent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of "loss of future earnings", if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity."

15. Applying the above steps or principles to the fact of this case, it is necessary to note that the disablement to the extent of

30% suffered by the respondent-claimant was facial. This disablement did not seriously affect the respondent's duties as food and beverages in charge. However, Mr Kamat is right in submitting that such facial disablement would have had some impact upon the discharge of the respondent's duties in the hospitality industry. Further, the 5% permanent disability to the lower limb again would not, per se, interfere significantly with the discharge of the respondent's duties as food and beverage in charge. No doubt, as deposed by Dr Kunal Fadte (AW4), the disability would affect the respondent while climbing steps, sitting down or squatting. This Doctor also clarified that such injuries typically require five to six months to recover and start working.

16. Mr Kamat did try to urge that due to the disablement, the respondent's visa was not renewed, and the respondent ultimately lost his job as a food and beverages in charge at UAE. However, there is no evidence in support of this contention. The respondent, who deposed in 2019, merely stated that he has been working in UAE on a contract basis since 2013. He deposed to his visa expiring in 2018 but claimed that the same was not renewed due to his fitness problem. Again, no documentary evidence was produced in this regard, even though the respondent was deposing in March 2019.

17. *Sunita and Ors.* (supra) holds that the Tribunals must not consider pleadings in such matters pedantically. This decision also refers to claimants' difficulties in producing witnesses, mainly in establishing precisely how the accident may have occurred. This decision, to my mind, would not assist the respondent in urging this Court to accept some factual aspects that were not deposed to by the respondent himself or those which are not backed by any documentary evidence when documentary evidence would mainly be available in case what was being contended was true.

18. Besides, there is no dispute that the respondent was 53 years old at the time of the accident. Moreover, there is evidence that soon after the accident, he did return to UAE. Therefore, on considering all these aspects cumulatively and applying the test in *Raj Kumar* (supra) and *Jithendran* (supra), the functional disability, in this case, can be taken at the maximum of 25%. Ordinarily, I was inclined to take functional disability at only 20%. However, regarding the observations in paragraph 26 of *Jithendrna* (supra), it would be appropriate that the functional disability is taken at 25%. In paragraph 26, the Hon'ble Supreme Court has held that an individual not only impairs his cognitive abilities and physical facilities but also has multiple other non-quantifiable implications for the victim. These aspects also must be taken into account.

19. Regarding the respondent's income, the Tribunal has correctly observed that the respondent failed to produce any evidence about his earnings, even though there must have been documentary evidence if the respondent's version was correct.

20. Therefore, by taking the functional disability at 25%, the compensation towards dependency would come to ₹3,30,000/-. There is no case made out to disturb the compensation awarded towards medical expenses, attendant charges, transport expenses, food and nourishment and pain and suffering. Thus, the total compensation, in this case, would come to ₹4,85,000/- and not ₹6,17,000/- as held by the Tribunal.

21. Accordingly, this appeal is partly allowed. As a result, the compensation amount awarded by the Tribunal is scaled down to ₹4,85,000/-. However, the interest awarded by the Tribunal is maintained.

22. The respondent would now be entitled to withdraw the amount deposited by the appellant in this Court with interest, if any, that shall have accrued thereon. For this, the respondent will have to furnish identification and bank details so that the Registry can directly transfer this amount in the respondent's bank account.

23. The respondent will be free to execute the balance amount as now modified.

24. The appeal is disposed of in the above terms without any cost order.

M. S. SONAK, J.

NITI K HALDANKAR Digitally signed by NITI K HALDANKAR Date: 2022.12.05 10:52:54 +05'30'