

Santosh

**IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.94 OF 2017**

National Insurance Co. Ltd.
Through its Manager,
Having Office at Magiedada Mansion,
Ponda, Goa. Appellant.

Versus.

1. Babi Sitaram Harmalkar,
55 years of age, unemployed,
r/o. Pethwada, Kudnem,
Sanquelim, Goa.

2. Subhash Pandurang Salgaonkar (since
deceased) :

a) Pandurang M. Salgaonkar,
72, years of age,

b) Smt. Saraswati Pandurang Salgaonkar,
66 years of age,
Both residing at H.No.320/1,
Limavaddo, Tivim, Bardez, Goa. Respondents.

Mr. U. R. Timble, Advocate for the Appellant.

None for the Respondents.

CORAM : M. S. SONAK, J.

DATE : 23rd June 2022

ORAL JUDGMENT: -

1. Heard Mr. U.R. Timble for the Appellant-Insurance Company. The Respondents, though served, were neither present nor represented.

2. The challenge in this Appeal is to the Judgment and Award dated 25/11/2011 made by the Motor Accident Claims Tribunal at Mapusa (Tribunal) in Claim Petition No.66/2009.

3. The Tribunal has awarded the Claimants compensation of ₹18,76,000/-, together with interest at the rate of 9% per annum from 19/11/2009, *i.e.* the date of application till actual payment.

4. The claim petition arises from an accident between the Claimant who was proceeding from Kudne to Sanquelim by his scooter and a tipper truck from the opposite direction. The Claimant sustained injuries and suffered permanent disability to 60% of his right hand.

5. Mr. Timble, learned Counsel for the Appellant, submits that even though the medical evidence had indicated disability to 60%, the Tribunal has taken the disability percentage at 100 %. Accordingly, he submits that this was impermissible, and the Award made on such basis warrants interference.

6. Mr. Timble submits that the truck driver did not have a valid license, which amounts to a fundamental breach of the Insurance Policy. He submits that despite raising such a plea, no issue was framed by the Tribunal, thereby prejudicing the Appellant-Insurance Company.

7. Mr. Timble finally submits that the Panchanama very clearly indicates black stain marks on the truck, indicating the scooter dashing the truck from the hind. Mr. Timble submits that this evidence is suggestive of at least contributory negligence on the Claimant's part. Finally, he submits that the Tribunal has not even considered this aspect.

8. Considering the above submissions in the context of the material on record, in my opinion, the impugned Award warrants no interference.

9. Though the medical certificates speak of disability to the Claimant's right hand to the extent of 60%, the functional disability, in this case, has been correctly assessed at 100%. Furthermore, there is evidence that the Claimant was a mechanic with Sesa Goa. On account of the disability suffered, the Claimant lost his job. To a mechanic, his right hand is most

important, and a 60% disability to his right hand will effectively render him unfit to discharge his duties as a mechanic. Therefore, there is no error in the approach of the findings recorded by the Tribunal.

10. On the alleged absence of a valid driving license, though the defense was raised, the Appellant-Insurance Company did not insist on an issue being cast. In any case, the Appellant did not apply for the recasting of the issues at the right stage or point out to the Tribunal that no such issue was framed.

11. Even in the absence of any issue, the Appellant could have always led evidence to prove that the driver of the truck indeed had no valid driving license. The burden of proving the fundamental breach of the Insurance Policy, in such a situation, would be on the Insurance Company that was seeking to avoid the liability. In the absence of evidence, no case is made to disturb the Award.

12. The contention based on the Panchanama also cannot be accepted at this stage. This is more so because the truck driver was not examined as a witness in this matter. If any of the parties were serious in their contention about contributory negligence, then

proper evidence should have been led on this aspect. In the absence of any such evidence, even this contention cannot be accepted.

13. For the above reasons, this Appeal is liable to be dismissed and is, hereby, dismissed.

14. There shall be no order for costs.

M. S. SONAK, J.

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