

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.27 OF 2016

Selmen Fernandes,
son of Seby Fernandes, 21 years in age,
unemployed, Indian National,
unmarried, Resident of 19, Adsulem,
Benaullim, Salcete, Goa.

..... Appellant.

Versus.

1. Vernilha Rosa Piedade Silva,
wife of Rafael Silva, major in age,
housewife, Indian National, resident of
H.No.37/A, Cana Benaullim, Salcete,
Goa.

2. Andre F. Berreto,
son of Berreto, major in age,
employment unknown, marital status
unknown, Indian National, resident of
H.No.247, Tondtem, Morod,
Cansaulim, Vasco-da-Gama,

3. IFFCO-TOKO General Insurance
Co. Ltd. A Company incorporated
under the Companies Act, 1956, having
its Office at IFFCO Sadan, C-1,
District Centre, Saket, New Delhi – 110
071, having regional office at A/2, First
Floor, Reliance House, Isidorio Baptista
Road, Pajifond, Margao, Goa.

..... Respondents.

Mr. Shailesh Redkar, Advocate *for the Appellant.*

None *for the Respondents.*

CORAM : M. S. SONAK, J.

DATE : 23rd June 2022

ORAL JUDGMENT: -

1. Heard Mr. Redkar for the Appellant. The Respondents though served, are neither present nor represented.
2. The challenge in this Appeal is to the Judgment and Award dated 21/7/2015 made by the Motor Accident Claims Tribunal at Margao (Tribunal) in Claim Petition No.216/2011.
3. The Appellant is the Claimant and is aggrieved by the award of only ₹60,055/- as against his claim of ₹5,00,000/-.Hence, the Appeal.
4. Mr. Redkar submits that the Appellant had suffered a permanent disability of 7.5%, which the Tribunal has not appropriately appreciated. He submits that the formula for assessing compensation in disability cases is set out in ***Sandeep Khanuja vs. Atul Dande and anr.*** (2017) 3 SCC 351 and ***Erudhaya Priya Vs. State Express Transport Corporation Ltd.***

- 2020 SCC Online SC 601 and the Tribunal has not followed this formula. He submits that there was an injury to the index finger of the Appellant, coupled with the permanent scar on his face. He submits that this affects the Claimant's vocation as a steward/waiter and towards loss of earning compensation of ₹1,58,760/-, which includes loss of earning in future, should have been awarded by the Tribunal. He submits that the compensation of only ₹ 20,000/- towards pain and suffering is also erroneous and minimum compensation of ₹50,000/- was due.

5. Mr. Redkar submits that clear and convincing evidence was produced about the Appellant's income being ₹7,000/- per month, and the Tribunal erroneously reduced this to ₹5,000/- per month. Besides, there was no allowance drawn for future prospects.

6. Mr. Redkar submits that this was not a case of contributory negligence because the Appellant was acquitted in the criminal trial. However, he submits that the driver of the offending scooter had breached Rule 9 of the Rules of the Road Regulations, 1989. He, therefore, submits that the deduction up to ₹10,000/- made towards the contributory negligence may be struck off.

7. Mr. Redkar, based on the above submissions, submitted that compensation of ₹2,48,760/- should be awarded to the Appellant.

8. I have considered Mr. Redkar's submissions and perused and evaluated the material on record.

9. In my opinion, Mr. Redkar is right in submitting that the Appellant's income should have been taken at ₹7,000/- per month. The Appellant, besides examining himself, had also examined his employer. The employer clearly stated that he was paying the Appellant a salary of ₹7,000/- per month as a Steward in his restaurant. Therefore, there was no reason to reduce this amount to ₹5,000/-.

10. The disability certificate produced on record contains the opinion of Dr. Francis Akkara, Assistant Professor at the Goa Dental College & Hospital, Bambolim. His observations on examination and opinion read as follows :

"ON EXAMINATION:

- *Teeth present*

8 - 1	1 - 8
8 - 1	1 - 8

- *Teeth Missing – Non*

- Occlusion – Normal (Class one)

- TMJ movements – Normal

- Mouth opening – Normal

Facial Scar present – 7%

X-ray No.: LR-1220 dated 14/12/11

Opinion: *The percentage of permanent disability as per the guide lines for evaluation of physical impairment in facial injuries prescribed by the expert group meeting on disability evaluation and Dissemination (DCMS WHO) AIMS/New Delhi 1981 is determined as 7.5% (Seven & Half percent)."*

11. Thus, this is a case of 7.5 % permanent disability in terms of the guidelines for evaluation of physical impairment in facial injuries prescribed by the expert group. Furthermore, there is no reference to any disablement because of missing teeth or injuries to the index finger.

12. The Tribunal, in the above circumstances, has correctly concluded that the permanent disability on account of a facial scar will not seriously affect the Appellant's earning capacity in the present or future. Therefore, the claim for an amount of ₹ 1,58,760/- towards loss of earnings on permanent disability cannot be entertained. Accordingly, the Tribunal has granted compensation of ₹10,800/-. Though the basis for such an award is not entirely clear, as suggested by Mr. Redkar, this may

represent two months' income. Therefore, this amount can be enhanced to ₹15,000/-.

13. The decisions in *Sandeep Khanuja* (supra) and *Erudhaya Priya* (supra) no doubt provide the formula for determining the compensation in disability cases. Even these decisions refer to not just facial disability but the circumstance of the functional disability. In the present case, the Appellant's disability due to the facial scar has not significantly impacted his work as a steward. In any case, some compensation is awarded to the Appellant. Therefore, the two decisions will not be of any significant assistance to the Appellant's claim.

14. For the period during which the Appellant was being treated, the Appellant could not attend to his duties as a Steward. For this, the Tribunal has awarded a sum of ₹10,000/- corresponding to two months' salary. Again, this amount will have to be enhanced to ₹14,000/-.

15. Towards medicines, the Tribunal has awarded ₹4,853/-, and Mr. Redkar is right in submitting that this amount should have been rounded off to ₹5,000/-.

16. The Tribunal has awarded compensation of only ₹20,000/- towards pain and suffering. The evidence on record establishes that the Appellant was admitted to the hospital on 17/9/2010 and discharged on 22/9/2010. The Appellant was found with restriction in the movement of the left index finger and abrasions on the right cheek and the forehead. The Appellant also had abrasions on the left cheek and the bridge of the nose. There was a semicircular cut lacerated below the nose and lips. He had additional abrasions on the dorsum of the right wrist. There was an abrasion on the dorsum of the right hand, and a cut lacerated wound on the dorsum of the left hand between the index and the middle finger.

17. There is evidence that the Appellant suffered a fracture of the 3rd metacarpal base, fracture of the 2nd metacarpal head, and fracture of the index finger proximal phalanx. These injuries were all grievous. Dr. Gayatri Kulkarni (AW.2) deposed that the simple injuries would heal in 8-10 days, and the grievous injuries would take roughly 1 ½ – 2 months to heal. There is a hurt certificate of the Hospicio Hospital Margao on record.

18. Besides this, the Appellant was treated at the Goa Dental College & Hospital. The disability certificate issued by Dr. Francis Akkara is already discussed above.

19. Considering the above aspects, compensation of ₹20,000/- does appear to be inadequate, and the same is enhanced to ₹50,000/-.

20. Because of the facial scar, the Tribunal has awarded compensation of ₹25,000/- towards loss of marital prospects. There is no challenge to this aspect, and the same is maintained.

21. Thus, the total compensation now comes to ₹1,09,000/-. The Tribunal has deducted an amount of ₹10,000/- due to the Appellant's contribution to the accident. Though the evidence on record does point out that the fault, to a great extent, may have been of the driver of the other scooter involved in the accident, the Appellant cannot be held to be entirely blameless. The Appellant was criminally prosecuted. His acquittal is not very relevant because the standard of proof in such matters is that of the preponderance of probabilities. Even the Appellant should have adopted some precautions and that the finding of limited

contributory negligence on the Appellant's part warrants no interference.

22. Therefore, from the compensation of ₹1,09,000/- as now determined, an amount of ₹9,000/- can be deducted for the role played by the Appellant himself in the accident.

23. Thus, the compensation, in this case, is determined at ₹1,00,000/-. The Respondents are held jointly and severally liable to pay this amount to the Appellant, together with interest at the rate of 9% per annum from the date of the claim petition till actual payment.

24. The impugned Award is modified to the above extent.

25. The Appeal is partly allowed.

26. There shall be no order for costs.

M. S. SONAK, J.