2022:BHC-GOA:57

Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.108 OF 2013
WITH
CROSS OBJECTION NO. 17 OF 2013

FIRST APPEAL NO.108 OF 2013

National Insurance Co. Ltd.,
WamanSmruti, Near Lakshmi Narayan
Temple, Mapusa, Goa-403507
Through its authorised Officer,
Mr. A. U. Shrinke, major,
residing at Kapileshwari, Honda, Goa **... Appellant**

Versus

1) Mr. Neelesh Raghavendra Naik,
Aged 37 years, occupation: Service,
resident of VP House No.205, Ela,
Old Goa – 403 402

2) Mr. Ritesh Govind Naik,
Aged 33 years, Occupation: Service,
Resident of House No.67, Damshe,
Sattari, Goa-403506
(owner of Motor Cycle No. GA-04-A-6880)

3) Mr. Joel Joseph
Age: major, Occupation: Business,
Resident of H.no.413,
Near Laxmi Bar, Nerul, Tinto,
Bardez, Goa (the owner of Maruti Swift Car No. GA-01-R-9237)

4) The New India Assurance Company Limited,
Coscar Corner, First Floor Hotel
Bardez, Mapusa, Goa-402507.

(Policy No.141302/31/05/05835)
(Period from 15/9/2005 to 14/9/2006)
(Insurer Motor Cycle No.GA-04-A-6880) **.... Respondents**

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

Ms. Renika D'souza, Advocate *for the Respondent No.3.*

Mr. Emerico E. Afonso, Advocate *for the Respondent No.4.*

WITH
CROSS OBJECTION NO. 17 OF 2013
IN
FIRST APPEAL NO.108 OF 2013

Joel Joseph
major of age,
occupation Business
resident House No.413, near Laxmi Bar
Nerul Tinto, Bardez-Goa
(owner of Maruti Swift car GA-07-R-9231) **...Appellant**

Versus

1. National Insurance Co. Ltd.,
Waman Smruti Near Lakshmi Narayan
Temple, Mapusa-Goa
Through authorised officer,
Mr. A. V. Shrinke, major of age,
residing Kapileshwari, Honda-Goa

2. Mr. Neelesh Raghavendra Naik,
Aged 37 years, occupation: Service,
resident of V.P. House no.205, Ela,
Old Goa – 403 402;

3. Mr. Ritesh Govind Naik,
Aged 33 years, occupation: Service,
Resident of House no.67, Damshe,
Sattari, Goa-403506 **...Respondents**

2022:BHC-GOA:57

Ms. Renika D'souza, Advocate *for the Appellant.*

Mr. U. R. Timble, Advocate *for the Respondent No.1.*

CORAM: M. S. SONAK, J.

Date: 19th January 2022

ORAL JUDGMENT:

Heard Mr. U.R. Timble, learned Counsel for the appellant, Ms. Renika D'Souza, learned Counsel for respondent No.3 (owner/driver of the offending vehicle), and Mr. Emerico Afonso, learned Counsel for respondent No.4.

2. Though the respondent-claimants are served, today, they are neither present nor represented. This matter was adjourned from yesterday, i.e. 18.01.2022, to enable the learned Counsel for the respondent-claimant to appear. Mr. Timble gave necessary intimation to the learned Counsel and even the registry of this Court gave necessary intimation to the learned Counsel for the respondent-claimant. However, today, there is no appearance on behalf of the respondent-claimant. This matter is of the year 2013 and the same can therefore brook no further delay.

3. The challenge in this appeal is to the judgment and order dated 01.12.2011 made by the Motor Accident Claims

Tribunal allowing the claimant's petition in the following terms:

> *'The petition is partly allowed holding the respondents no.1-3 jointly and severally liable to pay the compensation in the sum of ₹20,02,600/- to the claimant which shall carry interest at the rate of 9% p.a. from the date of the application till the date of the award and further interest at the same rate in case the said amount is not paid within a month from today till payment. The amount, if any, paid in his favour under section 140 of the Act 1988 shall be adjusted against the compensation appropriately and the claimant shall also be entitled to the costs of the petition.*
> *Award to be drawn accordingly.'*

4. The Insurance Company aggrieved by the aforesaid determination of compensation has instituted First Appeal No.108 of 2013. Similarly, respondent No.3, i.e. the owner of the vehicle involved in the accident has preferred cross objection No.17 of 2013 to defend the findings of the involvement of his vehicle or for that matter the rashness and negligence of the driver of the offending vehicle.

against him. If the evidence of Neelesh (AW-1), Head Constable Sawant (AW-2), and Joel-respondent No.3 herein(RW-1) is perused, then, there is evidence to establish rashness and negligence on behalf of said Joel (RW-1). Ms. Renika D'Souza further contended that Joel has been acquitted in a criminal case that was lodged against him. Such acquittal, according to me, is not quite relevant in the present matter where the issue of rashness and negligence needs to be considered under the proposition of preponderance and not proof beyond a reasonable doubt. Besides, if the judgment and order dated 11.12.2009 acquitting Joel is perused, then, it is very clear that the acquittal was by giving Joel "benefit of doubt". This is stated so in express terms in the judgment and order dated 11.12.2009 made by the learned Judicial Magistrate First Class in Criminal Case No.173/S/2006/C. Therefore, there is no merit in the cross-objections that have been filed by respondent No.3 and the cross-objections are liable to be dismissed.

6. Ms. Renika D'souza, learned Counsel, however, submitted that in the alternative even if it is held that there was some rashness and negligence on the part of respondent No.3, still, the offending vehicle was insured with the insurance company and, therefore, the entire liability to pay compensation

will lie with the insurance company. This submission is quite correct and deserves acceptance. The offending vehicle was duly insured and there is no dispute that the insurance policy would require the insurance company to indemnify respondent No.3 in the matter of payment of compensation.

7. Mr. Timble, learned Counsel for the appellant-insurance company has also not disputed the liability of the insurance company to indemnify the owner/driver of the offending vehicle. Mr. Timble however contended that the compensation of ₹20,02,600/- determined by the Tribunal is not just compensation but rather such determination is a result of an error apparent on the face of the record. He points out that the doctors, in this case, had certified that the claimant had incurred a permanent disability to the extent of 50% only to the right lower limb. He points out that this certificate/evidence has been entirely misconstrued by the Tribunal to hold that the certificate/evidence had established that the claimant had incurred permanent disability to his entire body to the extent of 50%. He submits that this is a clear error apparent on the face of the record and the compensation which is determined based on such an error warrants interference. He relies on ***Raj Kumar v/s. Ajay Kumar And Another***[1] in support of his contention.

1 (2011) 1 SCC 343

8. Mr. Timble, without prejudice submits that in this case considering the permanent disability to the extent of 50% only to the right lower limb and the voluminous evidence on record that this disability has not at all affected the duties and earnings of the claimant, the overall disability can be regarded to the extent of maximum 10%. He submits that the award of compensation on such basis would be much less than what has now been determined by the Tribunal. He, therefore, urges interference with the impugned judgment and award.

9. Since the respondent-claimant is neither present nor represented, I have, with the assistance of the learned Counsel scanned the evidence on record and analyzed the same to test the grounds now raised by the insurance company in its appeal.

10. The certificate issued by Dr. Bandekar who has also deposed in this matter as AW-3 indicates that the percentage of permanent disability, according to AIIMCO scale, amounts to 50% of the *right lower limb***.** This is consistent with the findings on record which indicate that the claimant, as a result of the accident, suffered serious injuries to his right lower limb. The other injuries sustained by the claimant were not that serious and in any case, have not contributed to any permanent disability to

his entire body. From the perusal of the impugned judgment and award, however, it does appear that the Tribunal has misread this certificate (at Exhibit-16) dated 27.12.2008 issued by Dr. S. M. Bandekar and also misread the evidence of Dr. S. M. Bandekar (AW-3) and proceeded on the basis that the overall disability or the disability to the extent of the entire body was certified at 50%.

11. In ***Raj Kumar v/s. Ajay Kumar*** (supra) the Hon'ble Supreme Court has held that the percentage of permanent disability is expressed by the doctors with reference to the whole body, or more than often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of the left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different

percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body cannot obviously exceed 100%. The Hon'ble Supreme Court has further held that the Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. Where the claimant suffers a permanent disability as a result of 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. What is required to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the 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).

12. Therefore, in such matters, the Tribunal has to adopt the following principles set out in paragraphs 13 and 14 which read as follows:

> *'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.'

13. If the Award is perused, then, it is obvious that the principles of ***Raj Kumar v/s. Ajay Kumar***(supra) have not been applied. Moreover, in this case, the Tribunal has equated the percentage of disability in respect of the right lower limb with the overall disability, which is erroneous. The Tribunal has not found out the impact of the disability to the right lower limb on the entire body of the claimant or the overall disability suffered by the claimant.

14. Normally, this would require a remand along with the recall of certain witnesses including, the doctors (AW-3) who deposed in this matter. However, considering the evidence already on record and the time-lapse of seven years, a remand, in the circumstances of the case would not be an appropriate option at this stage. Instead, from the evidence on record, it can be concluded that the impact of 50% disability on the right lower limb of the claimant would be equivalent to the impact of 10%

permanent disability on the entire body of the claimant. This is more so because the evidence on record establishes that this disability to the right lower limb has not at all affected the earning capacity of the claimant.

15. In fact, there is evidence on record that suggests that the claimant even received an enhanced salary post this accident and injuries. This is clear from the evidence of Dattatreya Deshpande (AW-6) who deposed that the claimant was working as a Regional Sales Manager and his salary was not reduced post his accident and added that the claimant was earning a higher salary. Similarly, Dr. Bandekar (AW-3) who had issued the certificate also deposed that the injuries would not affect the claimant who was working as a Regional Sales Manager in a Pharmaceutical concern. AW-3 further deposed that the claimant would have difficulty in climbing steps and difficulty in walking fast due to the disability. He also deposed that the claimant would not be able to sit cross-legged. He also deposed that the claimant can drive a vehicle provided it has upper limb controls. Taking into account all these factors the overall disability can be taken as 10% but certainly not 50%.

16. The evidence on record also establishes that the

permanent disability has not affected the earning capacity of the claimant and to this effect, there is a finding recorded by the Tribunal in this impugned Judgment and Award. The Tribunal has, therefore, awarded compensation of ₹1,00,000/- towards pain and suffering, ₹90,000/- towards attendant charges, and ₹1,50,000/- towards loss of daily allowance, monthly incentives, and annual incentives.

17. According to me, towards the above 3 heads, the compensation can be cumulatively determined at ₹4,00,000/- since compensation of ₹1,00,000/- towards pain and suffering appears to be quite inadequate in the facts and circumstances of the present case. The Court will have to consider the inconvenience caused to the claimant due to the injury and consequent permanent disability. The Court will also have to consider the evidence of AW-3-Dr. Bandekar when he describes the kind of difficulties the claimant will have to face on account of the injuries sustained in the accident. Therefore, under these 3 heads, the just compensation would amount to ₹4,00,000/-.

18. Further, there is no warrant to interfere with the findings of the Tribunal that the claimant was drawing an income of ₹21,000/- apart from certain fees and perquisites. There is also

no reason to interfere with the finding of the age of the claimant being 37 years at the time of the accident. The Tribunal has correctly applied the multiplier of 15 in this case. Having regard to the overall disability percentage of 10%, the compensation will come to approximately ₹3,78,000/- or thereabouts. In the peculiar circumstances of the present case and considering the disability listed by Dr. Bandekar (AW-3), this figure can be increased to ₹4,00,000/-.

19. Thus, the just compensation, in this case, will come to ₹8,00,000/- and not ₹20,02,600/-. In this matter, there is no case made out to disturb the rate of interest awarded by the Tribunal.

20. Thus, for the aforesaid reasons, this appeal and cross-objections are disposed of by making the following Order:

ORDER

A) The first appeal is partly allowed and the compensation amount is reduced from ₹20,02,600/- to ₹8,00,000/-. The rate of interest of 9%p.a. is, however, maintained on this amount of ₹8,00,000/-.

B) The cross-objections filed by respondent No.3 are hereby dismissed but, it is clarified that the liability to

pay compensation will be that of the appellant-insurance company only.

C) From the amount deposited in this Court, the appellant-insurance company and the respondent-claimant will be entitled to make withdrawals in terms of the just compensation now determined by this judgment and order.

D) Both the parties will be entitled to the proportionate interest that will have accrued on this deposited amount.

E) Registry to facilitate the withdrawals no sooner the parties file their calculations.

21. The first appeal and cross-objections are disposed of in the aforesaid terms with no order as to costs.

M. S. SONAK, J.