
(2014) 11 BOM CK 0031
In the Bombay High Court
Case No : First Appeal No. 10 of 2010

Arvind Kumar Seth

APPELLANT

Vs

Babaji Govind Sawant

RESPONDENT

Date of Decision : 20-11-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 166

Citation : (2015) 1 ABR 368

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : Shambhu S. Kakodkar, Advocate for the Appellant

Judgement

U.V. Bakre, J.—Heard Mr. Kakodkar, learned Counsel appearing on behalf of the appellant. Both the respondents, though duly served after admission of the appeal, are absent.

2. This appeal is directed against the judgment and award dated 17.10.2008, passed by the learned Motor Accident Claims Tribunal of Salcete at Margao (M.A.C.T., for short), in Claim Petition No. 15/2007.

3. The appellant was the claimant, whereas respondent no. 1 was driver as well as the owner of the offending vehicle which was insured with the respondent no. 2. Parties shall hereinafter be referred to as per their status in the claim petition.

4. The claimant had filed the said claim petition under Section 166 of the Motor Vehicles Act, 1988 (M.V. Act, for short) for compensation of Rs. 6,00,000/- on account of injuries sustained by him in a motor vehicular accident.

5. The case of the claimant was as follows:-

On 24.10.2006, at about 2:00 p.m., the claimant was riding the motor cycle bearing registration no. GA-08/D-5771 on the road going from Nessai to Margao, from the left side of the road and at a slow speed when Maruti car bearing registration no. GA-02-J-7822 driven by the respondent no. 1 in a rash and

negligent manner and at a fast speed came from opposite direction on wrong side of the road and dashed against the claimant and his motorcycle thereby, causing injuries to the claimant and damages to the motorcycle. The claimant received serious head injury and also injuries to his right leg and was rushed to Hospicio hospital at Margao and thereafter, shifted to Apollo Victor hospital. There he was operated upon. The accident caused permanent disability to the claimant. The claimant who was only 27 years old and working with Leo's Silk Emporium, Colva, Betalbatim Road, Betalbatim as Purchase Assistant and earning Rs. 7,000/- per month, had to give up the said work and continue with the treatment.

6. The respondent no. 1 did not contest. The respondent no. 2, in its written statement, stated that the car driven by respondent no. 1 was not involved in the accident and that the claimant neither sustained any injuries nor any permanent disability on account of the accident. The respondent no. 2 specifically denied all the averments made by the claimant, in the petition.

7. Accordingly, issues were framed by the learned M.A.C.T. The claimant examined himself as AW-1; Shri Rajesh Kumar Singh, the alleged employer, as AW-2; Dr. Roopa Naik as AW-3; Dr. Shivanand Bandekar as AW-4; Dr. Amey Velingkar as AW-5; and Shri Abhishek Kumar Singh, an eye witness, as AW-6.

8. Upon consideration of the entire evidence on record, the learned M.A.C.T. held that the accident had occurred due to rash and negligent driving of the Maruti car no. GA-02/J-7822 by the respondent no. 1, due to which he gave dash to the motorcycle of the claimant and caused injuries to him. The learned M.A.C.T. further held that the claimant sustained multiple fracture injury including amputation of toes resulting into permanent disability of 5%. The learned M.A.C.T. found that the claimant was 27 years and held that at the relevant time his income could be taken to be Rs. 5,000/- per month. The learned M.A.C.T. held that the claimant was entitled to receive total compensation of Rs. 1,36,850/- with interest at the rate of 9% per annum from the date of the application till the date of the award and further interest at the same rate in case the amount is not paid within a month from the date of the award till payment. The amount paid to the claimant under Section 140 of the Motor Vehicles Act, 1988 has been ordered to be adjusted against the final compensation. The claimant, aggrieved by the quantum of compensation awarded, has filed this appeal, praying for enhancement of the same.

9. Mr. Kakodkar, learned Counsel appearing on behalf of the claimant urged that the claim was for Rs. 6,00,000/- and there was amputation of three middle toes of the right foot of the claimant and Dr. Amey Velingkar (AW-5) has stated that loss of said toes would hamper the day to day life of the claimant if, the same involves standing for long hours, walking or running. He submitted that the claimant was earning Rs. 7,000/- per month and this was proved by AW-2 and even there was salary certificate on record and according to him, the learned M.A.C.T. erred in taking the income of the claimant as only Rs. 5,000/- per

month. He also submitted that there was also severe head injury sustained by the claimant, besides multiple fracture injury and amputation of toes and the amount of Rs. 10,000/- awarded towards pain and suffering is very less and requires to be enhanced. He submitted that the amount of Rs. 54,000/- awarded by the learned M.A.C.T. towards permanent disability is also very less and pointed out that no compensation towards loss of earning capacity has been awarded. He relied upon the case of K. Suresh Vs. New India Assurance Company Ltd. and Another, . He further submitted that the claimant has lost amenities since he cannot not stand, walk or run for long time. According to the learned Counsel, the claimant has also lost chances of marriage to some extent. He submitted that no compensation under the said heads has been awarded by the learned M.A.C.T. He relied upon the case of Raj Kumar Vs. Ajay Kumar and Another, . He urged that if compensation is assessed in terms of the judgments cited by him, the claimant would be entitled to compensation of about Rs. 6,00,000/-. He therefore, prayed that the compensation be enhanced, accordingly.

10. I have perused the original record and proceedings and considered the arguments advanced by the learned Counsel for the claimant and also the judgments cited by him.

11. The evidence of the claimant (AW-1) and that of the eye witness, namely Abhishek Kumar Singh (AW-6) duly prove that the accident had occurred due to rash and negligent driving of the Maruti car bearing registration no. GA-02/J-7822, by respondent no. 1. There is no dispute that the said Maruti car belonged to the respondent no. 1 and was insured with the respondent no. 2, at the time of accident. There can also be no dispute that on account of the said accident, the claimant sustained injuries in form of fracture to the right tibia, head injury and amputation of three toes of the right foot. The respondents have not challenged the judgment and award of the learned M.A.C.T.

12. The only question that arises for determination in the present appeal is as to what should be the just and reasonable compensation to which the claimant is entitled.

13. In the claim petition, the claimant merely pleaded that the name of his employer was M/s Leo's Silk Emporium situated at Colva, Betalbatim and that his monthly income was Rs. 7,000/-. The claimant did not state as to: what type of work he was doing; as what; since when he started working with the said firm; and as to who was the proprietor of the said firm. AW-1, the claimant in his affidavit-in-evidence stated that at the time of the accident he was employed with M/s Leo's Silk Emporium at Colva, Betalbatim as Purchase Assistant and drawing salary of Rs. 7,000/- per month and had to give up the job since he could not continue to work due to the injuries caused in the said accident. Only a private salary certificate was produced by him as X-5, subject to proof. In his cross examination, a suggestion was put to him that he was not at all employed with M/s Leo's Silk Emporium, Colva, Betalbatim.

14. AW-2, Shri Rajesh Kumar Singh, stated in his affidavit-in-evidence that he is the proprietor of Leo's Silk Emporium situated at Colva, Betalbatim and that the claimant was working with him as a Purchase Assistant and was drawing salary of Rs. 7,000/- per month and that due to injuries sustained in the accident, he stopped working for him. AW-2 identified his signature on the salary certificate dated 22.11.2006 which was then marked as Exhibit-44, wherein he certified that the claimant was working in the organisation as a Purchase Assistant and was drawing a consolidated salary of Rs. 7,000/- per month and that he was unable to work due to injuries caused to him and as such, he discontinued to work with them. Nothing to establish the existence of such an emporium was produced on record. In the cross examination, AW-2 admitted that the claimant is residing in the same flat in which he is resides. He admitted that the claimant is his distant relative. However, he denied the suggestion that the claimant was not in employment with him and that he issued him the certificate only because the claimant was residing with him. He admitted that the salary certificate did not disclose the details of his employment as to when he started working. AW-2 admitted that there was no record in the salary certificate that the claimant was working with him around the time of the accident. Though he added that the salary paid to the claimant was disclosed in the income tax returns filed by him, however, he did not produce any income tax returns.

15. It is pertinent to note that though, Shri Abhishek Kumar Singh (AW-6) is the son of Shri Rajesh Kumar Singh (AW-2), AW-6 did not at all state in his evidence that the claimant was working as Purchase Assistant for Leo's Silk Emporium belonging to his father. This was inspite of the fact that AW-6 was residing in the same flat in which the claimant was residing. In the circumstances above, it cannot be believed that the claimant was working for AW-2 and was earning Rs. 7,000/- per month. However, the claimant was 27 years old at the relevant time and in my view, the learned M.A.C.T. has rightly considered that the income of the claimant could be taken as Rs. 5,000/- per month, since he was young able bodied person to earn reasonable income. I am unable to accept the contention of the learned Counsel for the claimant that the claimant had proved that his income was Rs. 7,000/- per month.

16. AW-5, Dr. Amey Velingkar, Orthopedic Surgeon attached to Apollo Victor hospitals, Margao stated that the claimant was first admitted on 24.10.2006, as a case of closed comminuted fracture of the right tibia with compound fracture of the proximal phalynx of the first and second toe with vascular deficit in the second, third and fourth toe. He stated that the claimant had also suffered head injury with the loss of consciousness and had sustained trauma to the left hip. He stated that the claimant underwent closed reduction with interlocking nailing on 25.10.2006 with debridement suturing and K wire fixation of the toes. He stated that the patient was developing a dry gangrene of the second, third and fourth toe, secondary to the vascular deficit, whereas, the head injury was treated conservatively. He further stated that the patient later on came for dressing till the dry gangrene was well defined and an amputation of the second, third and

fourth toes was undertaken on 30.11.2006 and the patient was discharged on 01.12.2006 and was advised regular follow up for check up in respect of the surgical wounds and in between debridements were done at the OPD. The said follow up treatment was last done on 05.01.2007 when the wound-healing was good and patient was advised to resume his duties. He stated that the head injury suffered by the claimant was a linear fracture of the skull with a small hemorrhagic bleed which was treated conservatively. He stated that both the injuries, the head and fracture injuries were grievous in nature. In his cross examination, AW-5 has stated that loss of second, third and fourth toes would not hamper his day to day life unless it involves standing for long hours, walking or running.

17. AW-4, Dr. Shivanand Bandekar, Professor and Head of Orthopedics, Goa Medical College, examined the claimant on 24.08.2006 and thereafter on 28.02.2007 for evaluation of percentage of permanent disability and on examination found that the claimant had united fracture tibia with interlocking nail in situ and mild stiffness of the knee joint. According to AW-4, the permanent disability amounted to 5% as per ALIMCO scale and the patient had lost second, third and fourth toes of the right foot with amputation. The disability certificate issued by AW-4 is at Exhibit 50. In the cross examination, AW-4 specifically stated that as Purchase Assistant, the claimant would not be affected in his work on account of 5% disability. This was not denied.

18. The learned M.A.C.T. has awarded a sum of Rs. 54,000/- towards permanent disability, since the permanent disability was only 5%. In the case of "K. Suresh" (supra), the Hon"ble Supreme Court has held that the findings of the High Court that once compensation was awarded towards permanent disability, no further amount could be awarded for loss of earning capacity is unsustainable. In the case supra, the claimant had sustained triple fracture in spinal cord, fracture in left leg neck of femur, fracture in right hand shoulder, deep cut and degloving injury over right left thigh bone and above all multiple injuries all over the body. Pedicle screws were inserted into pedicles of D11 vertebra and pedicle screws were passed into pedicles of L1 vertebra. Two screws on left thigh were fixed using a rod each. Decompression of D12 vertebra was done and bone chips were placed in the intertransverse area on both sides. After trauma, the victim had numbness below the knee joint and was facing difficulty to stand and sit comfortably and had been constantly availing physiotherapy treatment and therefore, facing difficulty in carrying out his normal activities. A disability certificate issued, showed permanent disability at 75%. Before the High Court, since serious objections were raised pertaining to percentage of disability, the claimant was referred to the Medical Board and it was found that he had compression fracture which had healed with persistence of pain in the back with root involvement causing grade IV power in left lower limb and, accordingly, the Board fixed the permanent disability at 40%. The High Court awarded Rs. 4,68,000/- towards loss of earning capacity and held that there cannot be grant of compensation under two heads, namely permanent disability and loss of

earning power. In the case supra, the Hon"ble Supreme Court referred to its observations in the case of "Raj Kumar" (supra), wherein, inter alia, it is observed that 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. The Tribunal should not mechanically apply the percentage of economic loss or loss of earning capacity. It is further observed that in some cases on appreciation of evidence and assessment, the percentage of loss of earning capacity as a result of the permanent disability would be approximately the same as the per the percentage of the permanent disability in which case, of course, the Court or Tribunal would adopt the said percentage for determination of compensation. Therefore, the grant of compensation towards permanent disability as well as loss of earning capacity is separately dispensed upon the facts and circumstances of each case. In the case of "Rajkumar" (supra), the Hon"ble Supreme Court observed that all injuries (or permanent disabilities arising from injuries) do not result in loss of earning capacity.

19. In the present case, the evidence on record does not establish that the claimant on account of amputation of three toes and permanent disability of 5% had lost his earning capacity or that his earning capacity had reduced. The evidence of AW-5 to the effect that the amputation of second, third and fourth toes would not hamper his day to day work, unless standing for long time, walking or running, cannot be taken to mean that the earning capacity of the claimant was lost or reduced. On 28.02.2007, AW-4, Dr. Shivanand Bandekar had examined the claimant specifically for evaluation of percentage of permanent disability. He found that the permanent disability was 5% and further that the claimant as Purchase Assistant would not be affected in his work on account of said 5% disability. In such circumstances, the question of awarding to the claimant further amount for loss of earning capacity does not arise. The amount of Rs. 54,000/- granted by the learned M.A.C.T. towards permanent disability is quite reasonable.

20. In the case of "K. Suresh" (supra), on account of serious injuries sustained by the claimant (as mentioned in paragraph above) and permanent disability of 40%, the compensation towards pain and sufferings was fixed at Rs. 2,00,00/-. In the case of "Raj Kumar" (supra), where the permanent disability was 45%, an amount of Rs. 25,000/- was awarded as compensation towards pain and sufferings. In the present case, considering the injuries sustained by the claimant, which resulted in permanent disability of only 5%, an amount of Rs. 10,000/- has been awarded towards pain and sufferings, which in my considered view just and reasonable. There is no evidence regarding loss of amenities suffered by the claimant in the present case. Hence the question of granting compensation under this head does not arise. The claimant, neither in the petition nor in his affidavit-in-evidence alleged that his chances of getting married have reduced. In fact there is no evidence to show that he was

unmarried at the time of accident and is still unmarried. Merely because in some cases compensation is granted under this head, that does not mean that in all cases the same should be done, even where there is no evidence at all. There is no loss of expectation of life.

21. There is no dispute regarding the amount of Rs. 8,378/- awarded towards medical treatment, Rs. 27,451/- towards hospitalisation, medication and treatment as per the bills produced by the claimant and under these heads, there is no question of enhancement of the compensation. The learned M.A.C.T. has taken into consideration that there was actual loss of earning for a period of six months. The learned M.A.C.T. has awarded a sum of Rs. 30,000/- under this head by taking into consideration the monthly income of the claimant as Rs. 5,000/-. Since the claimant has sustained grievous injuries, the learned M.A.C.T. awarded Rs. 10,000/- towards pain and suffering. Above all, though the claimant had not proved the transport bills marked X-3 colly, subject to proof and the attendant's bills marked as X-4 colly subject to proof, the learned M.A.C.T. has awarded a sum of Rs. 2,000/- towards travelling and Rs. 5,000/- towards attendant. Thus, total compensation awarded is Rs. 1,36,850/- and the respondents have been directed to pay the same with interest at the rate of 9% per annum, from the date of the application till the date of the payment. In such circumstances, the compensation awarded by the learned M.A.C.T. is just and unreasonable. No interference is therefore called for in the impugned judgment and order.

22. Hence, the appeal stands dismissed.