
(2022) 06 BOM CK 0103
In the Bombay High Court
Case No : First Appeal No.13 Of 2019

Vetkesh Suresh Chalwadi @ Mulgund	APPELLANT
Vs	
Daniel Capsy Gomes And Others	RESPONDENT

Date of Decision : 24-06-2022

Acts Referred:

Constitution Of India, 1950 — Article 21

Citation : (2022) 06 BOM CK 0103

Hon'ble Judges : M. S. Sonak, J

Bench : Single Bench

Advocate : Cristabel Afonso

Final Decision : Disposed Of

Judgement

M. S. Sonak, J

1. Heard Ms. Cristabel Afonso 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 01.10.2018 made by the Motor Accident Claims Tribunal (Tribunal) in Claim Petition No.14/2016.
3. By the impugned award, the Tribunal has awarded the appellant compensation of Rs.4,23,000/- along with simple interest @ 9% p.a. from the filing date of the petition till full payment. This compensation is awarded to the appellant on account of the injuries and consequent medical disability to the extent of 45% suffered by him because of his involvement in a vehicular accident that took place on 16.12.2014.
4. The Tribunal had assessed the compensation payable to the appellant at Rs.7,05,000/-. However, the Tribunal also found that the appellant contributed to the accident by 40%. Therefore, the determined compensation was reduced by 40% and assessed as Rs.4,23,000/-.

5. Ms. Afonso has firstly challenged the finding on contributory negligence. She submitted that the evidence on the record made out no case of any contributory negligence. She submitted that the driver of the scooter bearing registration No.GA-08-W-3523, who dashed the claimant's motorcycle, did not even examine himself. Furthermore, there was evidence that prosecution was launched against the scooter driver for rash and negligent driving. She submits that if all these aspects were to be appropriately considered by the Tribunal, there would be no occasion for concluding any contributory negligence.

6. Ms. Afonso submitted that the appellant was a manual laborer. Because of the accident and the resulting injuries, the appellant is disabled from functioning as a manual laborer though the disability may have been certified by the doctors at 45%. She submits that the correct test is that of functional disability in such matters. She proposes that the functional disability should be taken at 100% in the present case.

7. Ms. Afonso submits that future prospects must be considered even where the claim is based on permanent disability incurred due to a vehicular accident. She relies on Pappu Deo Yadav vs. Naresh Kumar & Ors. – AIR 2020 SC 4424 in support of this contention.

8. Ms. Afonso finally submits that the awards made towards pain and suffering and future loss of income are a pittance. She proposes that towards pain and suffering, the appellant should be awarded compensation of at least Rs.1,00,000/-; towards medical expenses, the appellant should be awarded at least Rs.16,000/- as against Rs.5,000/- awarded by the Tribunal. She submits that the loss of income extended to three years, and the Tribunal erred in making an award for only one year. Finally, she proposes that towards future loss, the compensation of at least Rs.13,60,800/- is due by taking the disability at 45% even though the disability factor is much higher.

9. Ms. Afonso submits that the Tribunal has failed to make an award for loss of amenities, disfigurement, and future expenses even though the evidence on record justifies such an award.

10. To evaluate Ms. Afonso's contention, I have perused the material on record.

11. On the issue of contributory negligence, there is merit in the submissions of Ms. Afonso that the appellant did not contribute to the accident. The Tribunal has not only admitted but recorded a finding that the scooter driver was more on the wrong side of the road at the time of the accident. After that, however, the Tribunal reasoned that even the appellant was not completely on the left side of the road when proceeding from Panaji towards Cortalim. Therefore, the Tribunal has reasoned that the accident could have been avoided if the motorcycle had been more towards the left-hand side. Based on this reasoning, the Tribunal has held that the appellant contributed to the accident by 40%.

12. Once the Tribunal was satisfied that the scooter driver was more on the

wrong side at the time of the accident, there was no question of apportioning any blame on the appellant. Even otherwise, the evidence on record suggests that the appellant's motorcycle was on the left side of the road. Ms. Afonso is right that driving a vehicle on the extreme left side of the road is not always possible. Therefore, based on the observation that the appellant's motorcycle was not completely on the left side of the road, no blame should have been apportioned to the appellant.

13. That apart, the investigating agencies also chose to launch a prosecution against the scooter driver for rash and negligent driving. Though the result of such prosecution is unknown, the Head Constable Suryakant Mahale (AW3), who was examined in this matter, produced Final Report at Exh.26 along with the FIR and other case papers relating to such prosecution. There is nothing on record to indicate that the scooter driver ever challenged the prosecution launched against him.

14. In a claim petition, even the issue of rashness and negligence is required to be established by a preponderance of probabilities. Accordingly, the appellant stepped into the witness box and deposed to the accident. The scooter driver, however, chose to stay away from the witness box. In such circumstances, there was no justification for apportioning blame on the appellant.

15. For all the above reasons, the finding of contributory negligence is reversed. The scooter driver was alone responsible for the accident due to his rash and negligent driving of the scooter.

16. The next is the issue of just compensation.

17. From the testimony of the appellant (AW1) and Dr. Zelio D'Mello (AW2), it is established that the appellant sustained fractures of the right femur and right tibia, blunt chest injury, and head injury. AW2 has deposed that external treatment was applied for the right femur and right tibia, and daily wound dressing was done. He further deposed that the patient was re-admitted on 13.01.2015, and the external fixator was removed, after which the patient was discharged on 14.01.2015. The evidence of AW2 establishes that the claimant sustained 45% permanent disability of the right femur and right tibia.

18. The earlier award made by the Tribunal was set aside by this Court, and the matter was remanded to the Tribunal to enable the parties to lead fresh evidence because even after the disposal of the claim petition, it was found that the appellant required additional surgeries and treatment. In the additional affidavit in evidence filed before the Tribunal on 13.01.2015, the appellant deposed to his admission at the Goa Medical College (GMC) for removal of the external fixator. He also deposed about the follow-up dressing at the Primary Health Center in Chikhalim.

19. The appellant also deposed to his re-admission at the GMC on 11.08.2016, and an ORIF (open reduction and internal fixation) of broken bones was done

fixing tibial condular plate with 2 x 4.5 mm cortical, 6 x 4.5 cortical, 3 x 6.5 mm rolling cancellous and that he was discharged on 13.08.2016. He further deposed that on 03.01.2017, he was re-admitted to the Goa Medical College to treat infected implant in situ for lavage and Ab beads. On 04.01.2017, the screws were removed with antibiotics, beads, and placement, and he was discharged on 07.01.2017. He also deposed that on 11.01.2018, he was re-admitted to the Goa Medical College for infected united proximal tibial fracture, implant, and antibiotic. On 13.01.2018, the implant and antibiotic bead were removed, and he was discharged on 27.01.2018 with a follow-up of prescribed medicines.

20. The appellant also deposed to the medicines he has to take for life because the wound on his leg does not heal and causes him too much pain. The appellant also deposed about the wound being open, the leg bone being exposed and the infection setting in. He deposed about the pain he experiences day and night and how he is confined at home under the care of his wife. The appellant produced the case papers in support of his deposition. The appellant also deposed to the expenses incurred by him for his treatment.

21. Dr. Zelio D'Mello deposed in the matter both before and after the remand. He confirmed the nature of the injuries and the treatment reflected in the discharge summary. He also deposed to some of the bills produced by the appellant. He denied the suggestion that the subsequent admissions at GMC were on account of another accident in the year 2016.

22. Now considering all this evidence on record, it does appear that the compensation determined by the Tribunal is inadequate and does not represent just compensation.

23. Towards medical expenses, the appellant has produced bills, and an award of Rs.16,000/- in place of Rs.5,000/- would meet the ends of justice. Towards pain and suffering, considering the five surgeries and almost a month's admission in the hospital, compensation of Rs.1,00,000/- instead of Rs.50,000/- is due. Towards loss of amenities, compensation of Rs.15,000/- is due. Towards disfigurement, a further amount of Rs.50,000/- is due. This is because the evidence on record bears out that the appellant's leg is shortened by 1 inch and bent, and the open wound and the infection contribute to the disfigurement. Finally, an amount of Rs.50,000/- towards future medical expenses is due because further treatment, if not surgically but at least clinically, seems inevitable.

24. The Tribunal has already awarded Rs.30,000/- towards transportation and attendant charges, which appears to be adequate. In addition, the Tribunal has awarded Rs.1,20,000/- for loss of income for one year and a lump sum of Rs.5,00,000/-towards future earnings.

25. On the aspect of loss of income and future loss, the Tribunal, with respect, has erred. The evidence on record does establish that the appellant had incurred a medical disability of up to 45%. However, there is evidence on record that the

appellant was a laborer. Dr. Zelio D'Mello has deposed that the appellant's disability is permanent. He has deposed that the appellant will have a limp while walking due to the shortening of his leg because of the vehicular accident. He deposed that the appellant would not be able to bend his knee and will not be able to do any manual labor.

26. Considering the above evidence, functional disability, in my opinion, will have to be assessed at least 60%. However, the functional disability is not assessed at 100% because there is no evidence about the appellant being rendered unfit to do any kind of work. Admittedly, the appellant may not be able to do precisely the kind of manual labor with which he was involved at the time of his accident. But that does not mean that the injuries and disability have rendered him unfit to do any kind of work. Therefore, the interest of justice will be met if the functional disability is assessed at 60% even though the medical disability is quantified at 45%.

27. The Tribunal failed to take into account future prospects. However, in Pappu Deo Yadav (supra), the Hon'ble Supreme Court has held that such future prospects should also be considered in cases where compensation is claimed for disabilities.

The Court has held that the Tribunals should not adopt a stereotypical or myopic approach but instead view the matter by considering life's realities, both in assessing the extent of disabilities and compensation under various heads.

28. The Hon'ble Supreme Court has held that Courts should be mindful that a serious injury not only permanently imposes physical limitations and disabilities but too often inflicts deep mental and emotional scars upon the victim. The attendant trauma of the victim's having to live in a world entirely different from the one they are born into, as an invalid and with degrees of dependence on others, robbed of complete personal choice or autonomy, should forever be in the judge's mind, whenever tasked to adjudge compensation claims. Severe limitations inflicted due to such injuries undermine the dignity (which is now recognized as an intrinsic component of the right to life under Article 21) of the individual, thus depriving the person of the essence of the right to a wholesome life that they had lived, hitherto. From the world of the able-bodied, the victim is thrust into the world of the disabled, itself most discomfiting and unsettling. Therefore, tribunals should not nit-pick and award niggardly amounts oblivious of these circumstances; there is a resultant affront to the injured victim.

29. The Hon'ble Supreme Court in *OrsCourt.v.DivisionaloreferredManager, toits Unitedearlier Insurancedecisionin CompanySayedSadiqLimited* - (2014) 2 SCC 735 held that Courts and Tribunals should be sensitive while dealing with manual labour cases where limb loss is often equivalent to the loss of livelihood. The Hon'ble Supreme Court has discussed several cases and explained the concept of medical disability and functional disability.

30. Applying the above principles to the facts of the present case, functional

disability is assessed at 60%. The Tribunal has correctly held that the appellant's income was Rs.10,000/-. To this, applying the law laid down in Pappu Dev Yadav (supra), an addition of 40% is due. This addition is also in terms of the law laid down in National Insurance Co. Ltd. vs. Pranay Sethi & Ors. – 2017 (16) SCC 680. Thus the appellant's income will have to be taken at Rs.14,000/- and not Rs.10,000/-.

31. The appellant was 23 years old at the time of the accident; therefore, in terms of Pranay Sethi (supra), the multiplier would be 18. Moreover, there is no question of any deductions in this case because the appellant has his whole life to live with the disabilities incurred by him due to the accident. Considering all these aspects, compensation towards loss of earnings and future earnings would come to Rs.19,65,000/-. The total compensation, in this case, is therefore assessed at Rs.22,26,000/-. The interest awarded by the Tribunal is maintained.

32. This appeal is accordingly allowed, and the respondents are directed to jointly and severally pay to the appellant compensation of Rs.22,26,000/- together with interest @ 9% p.a. from the date of institution of the claim petition till the actual payment.

33. The respondents, including in particular the respondent no.3-Insurance Company are directed to deposit the enhanced compensation amount in this Court within two months from the date of service of this Judgment and Order upon them. Ms. Afonso states that she will furnish copies of this Judgment and Order to the respondents at the earliest and file proof of service in the Registry.

34. The respondents are to deposit the above amounts in this Court after giving notice to the learned counsel for the appellant. If any payments have already been made, they can be adjusted in the above amount. Upon deposit, the appellant will be entitled to withdraw the said amount by furnishing identity papers and bank details. The Registry to ensure that the amount is directly deposited into the bank account of the appellant.

35. The appeal is disposed of in the terms above.

36. There shall be no order for costs.