(1980) 06 GUJ CK 0001

In the Gujarat High Court

Case No : F.A. No. 619 of 1978

Ashish Jivrajbhai APPELLANT

Vs

Ashwinbhai Himatlal and Others RESPONDENT

Date of Decision : 23-06-1980

Acts Referred:

Citation : (1982) ACJ 195

Hon'ble Judges : R.C. Mankad, J;P.D. Desai, J

Bench : Division Bench

Advocate : J.J. Shah, for the Appellant; P.V. Nanavati, for the Respondent

Final Decision : Allowed

Judgement

P.D. Desai, J.—We must start this judgment with a frank confession. There are cases in which Judges often feel intensely, even if they do not say so expressly, that it is quite impossible to make adequate compensation in terms of money for the tragic consequences of the injury lasting for the life-time of the surviving victim of an accident, for, money cannot renew a physical frame that has been battered and shattered and alleviate the pain and suffering and restore the lost pleasure and enjoyment of life. The feeling is bound to be all the more deep and earnest when the victim is a young boy, the course of whose whole life is fundamentally affected as a result of the disabilities flowing from the accident. The Court must still assess the compensation, however, bearing in mind all the relevant circumstances of the case, as they are known upto the time of the trial and as far as they can for the future be reasonably foreseen, guided by the overall consideration that the injured person should be given a sum even if it appears to some minds to be ''daunting in its immensity'' which would ensure that he would not, within reason, want for anything that money could buy and would be able to live for the rest of his life in comfort and enjoyment comparable as nearly as possible with that which would have been his but for the accident.

2. The Appellant herein is a young boy aged about 12 now and aged about 7 at

the time of the accident. The accident occurred at about 9 a.m. on July 18, 1975. The site of the accident was near the railway crossing at the Sardar Patel Colony, Ahmedabad. The Appellant, who was at the material time studying in the third standard in the Sanskar School situated in the Sardar Patel Colony, was proceeding towards the school and was walking on the correct side of the road just by the side of the footpath. Motor cycle No. G.J.F. 3537, owned by the second Respondent and driven by the first Respondent, came from behind at an excessive speed and knocked down the Appellant. The Appellant became unconscious and started bleeding from the left ear. He was immediately removed to the Vadilal Sarabhai Hospital. The medical examination revealed an injury to the brain. While in the hospital, he underwent two operations. The first operation was performed on the day of admission to relieve him of the difficulty of respiration. Another operation was performed on July 23, 1975, in connection with the brain injury. He was also examined by an Eye Surgeon as it was noticed that there was abscess formation in the right eye due to the brain injury which ultimately resulted in loss of vision. He remained as an indoor patient in the hospital upto September 29, 1975, that is to say, for a period of about 2 months and 10 days. During the period of hospitalization, he was unconscious for about 15 days and semiconscious for about 20 days.

3. Two months after his discharge from the Vadilal Sarabhai Hospital, the Appellant was admitted as an indoor patient in the Nagri Eye Hospital on December 2, 1975. An operation for transplantation of cornea of the right-eye was performed but it was not successful. Though the whole eye was disorganized and there was complete loss of vision, the eye-ball could be maintained. He was discharged from the said hospital on December 30, 1975.

4. On November 21, 1975, the claim application out of which this appeal arises was filed by the Appellant through his guardian and next friend claiming compensation in the sum of Rs. 1,00,000/-. In the claim application, heads of compensation were not separately mentioned. However, at the trial, the claim for damages was advanced and specified under different heads such as medical and special diet expenses, nursing charges, post-hospitalization attendance and transportation charges, pain and suffering, loss of enjoyment and amenities of life and pecuniary loss. The Tribunal awarded a total compensation in the sum of Rs. 37,557/- as per the following particulars:

For medical and special diet expenses and nursing and transportation charges; Rs. 3,557/-

For pain, shock and suffering; Rs. 10,000/-

For economic loss; and Rs. 18,000/-

For personal loss due to loss of vision. Rs. 6,000/-

Total Rs. 37,557/-

The Tribunal also awarded interest at the rate of 6% per annum on the awarded amount from the date of the presentation of the claim application till payment and costs. The award was made against the first and second Respondents but the third Respondent (insurer) was directed to satisfy the award. The present appeal is directed against the said award and the claim in appeal is confined to Rs. 62,443/- being the amount of claim disallowed by the Tribunal.

... ...

6. It would be convenient to summarize at this stage the effect of the totality of the evidence on the issue of the injuries and after-effects of such injuries on the life and career of the Appellant.

... ...

8. The external injuries found on the person of the Appellant soon after his admission in the Vadilal Sarabhai Hospital were as follows:

(1) Abrasion on the left knee region, 3"?3".

(2) Abrasion on the right knee and right ankle 1" in diameter.

(3) Haematoma 3"?1/2" behind left ear.

(4) Contused lacerated wound on the left parieto-occipital region, 1/2" ? 1/4".

There was no fracture on any part of the body including the skull.

9. The internal injury sustained by the Appellant was on the brain. As soon as he was knocked down, he was rendered unconscious and started bleeding from the left ear. His clinical examination at the Hospital revealed that he did not respond to painful stimulus. His pupils were bilaterally semi-diluted and they reacted sluggishly. He remained unconscious for about 15 days after his admission and thereafter for a period of about 20 days he was semi-conscious. As he was experiencing difficulty in respiration, he was operated upon on July 18, 1975. Another operation was performed upon him on July 23, 1975, for his brain injury. All throughout the period of his hospitalization, he suffered intense pain. When he was discharged from the hospital on September 29, 1975, the Appellant was in the process of recovery, though there was weakness of limbs. He was unable to walk and to speak properly.

10. Even while he was confined in the Vadilal Sarabhai Hospital, it was noticed that the Appellant''s right eye had initially turned reddish and his eyeball gradually turned white. This was due to abscess formation consequent upon the brain injury. An Eye-Surgeon, who examined the Appellant at the Vadilal Sarabhai Hospital, prescribed some treatment but it was of no avail. By the time he was discharged from the hospital, he had lost his vision of the right eye.

11. On December 2, 1975, the Appellant was admitted as an indoor patient at the Negri Eye Hospital. On clinical examination, it was found that he had infected perforated corneal ulcer. He was operated upon for transplantation of cornea. The operation, as expected, was not successful, so far as regaining of vision is

concerned because the whole eye was disorganised. However, the operation ensured retention of the eye-ball and its only purpose, therefore, was cosmetic. After the corneal operation, the graft became wide. The Appellant was discharged from the hospital on December 30, 1975.

12. At or about the time of the trial that is to say, about two years after the accident, the Appellant was found to have weakness and loss of coordination of the upper left limb and the lower left limb. He was experiencing difficulty in speech and required outside help in day to day life. He was limping and could not walk on uneven surface. It was observed that it would be difficult for him to hold a glass of water or to pick up safety-pin from the ground or to switch on and to switch off light or to button his clothes with the use of his left hand. All this was on account of spastic hemiplegia, i.e., paralysis limited to one side of the body and loss of controlling influence due to spasm.

The permanent disability is assessed at 40% for the upper left limb and 30% for the lower left limb. The faculty of memory was also found to have been affected.

... ...

15. Though the evidence on record indicated that beside the loss of vision there was some disfigurement of the face as a result of the eye-ball of the right eye turning white, we thought it proper to view the Appellant in order to assess the extent of disfigurement in respect of which the evidence is not satisfactory and in regard to which the Tribunal has not given any specific finding. It is perfectly legitimate to undertake such visual examination and the Court of Appeal in England appears to be following such course in certain cases see, for example Mason v. Mason (1966) 1 W.L.R. 767. Although the question of disfigurement and of the extent of disfigurement is somewhat difficult and not easy to resolve, since we have had the advantage of seeing the injured Appellant, we found that there is a marked disfigurement of the face of the Appellant on account of the eye-ball bulging out of the socket and turning opaque white. We also found that the effect of hemiplegia was evident even upto the date of the hearing of the appeal because the grip of the left hand was weak and the gait was not absolutely normal.

16. Against this background, let us now turn to the question of assessment of damages.

Medical and special diet expenses and nursing and transportation charges.

The Appellant''s father, in the course of his deposition, stated that he had incurred a total expenditure of Rs. 7,557/- under the aforesaid combined head. He produced, at Ex. 26, details of the expenditure incurred by him under various sub-heads. The following are the broad particulars of the expenditure incurred under different sub-heads as set out in the said document:

Medicines and medical attendance charges. Rs. 1,090/-

Hospitalization charges. Rs. 1,076/-

Special diet. Rs. 530/-

Transportation charges. Rs. 178/-

Spectacles and accessories. Rs. 108/-

Servant charges. Rs. 25/-

Loss of income of father for providing services to the Appellant. Rs. 1,200/-

Attendant''s salary. Rs. 2,250/-

Total Rs. 6,457/-

As earlier stated, the Tribunal awarded compensation in the sum of Rs. 3,557/- under this combined head. The claim which the Tribunal disallowed related to the attendants'' salary (Rs. 2,250/-) and loss of six weeks'' salary income of father for providing services to the Appellant (Rs. 1,200/-). The ground on which these claims were disallowed was that there was no independent reliable evidence on the point. While we appreciate and agree with the Tribunal''s view point, in so far as the claim for attendants'' salary is concerned, we are unable to uphold its conclusion in regard to the claim for loss of the Appellant''s father''s income. The Appellant''s father has, in terms, deposed that he had proceeded on two and half months'' leave and that he was granted only one month''s leave with full wages. For the remaining period of one and half months, he was on leave without pay and had thus suffered a loss of Rs. 1,200/-. There is nothing in the cross-examination which detracts from the value of the aforesaid evidence.

The Appellant was confined to hospital for a total period of 3? months. Even on probabilities and worldly experience, the evidence on the point will require, acceptance. One cannot insist upon production of independent evidence in matters of such nature, especially when the claim is not high or substantial. In our opinion, therefore, the Tribunal''s award in so far as it disallowed compensation in the sum of Rs. 1,200/- on account of loss of income of the Appellant''s father during the period that he attended upon the Appellant, suffers from an obvious error. The Appellant would be entitled to an additional award in the sum of Rs. 1,200/- under the aforesaid combined head.

II. Pain and suffering and loss of amenities and enjoyment of life.

... ...

22. Now, in First Appeal No. 822 of 1974 and other three connected matters Ahmedabad Municipal Corporation and Another Vs. Niranjan Ambalal Patel and Others, we have recently awarded compensation in the sum of Rs. 37,000/- under this head only for the loss of vision of the right-eye in the case of a young man aged about 21. Even if, therefore, there was only the loss of vision without anything more, the Appellant would have been entitled to an award at least in the like amount. In fact, the Appellant being much younger in age and the

remainder of his life being comparatively longer and the pain and suffering and lost pleasures of life being to that extent more prolonged, the compensation would have been required to be made on a somewhat higher scale Besides, the Appellant has been left with a disfigured face on account of a bulging eye and a discoloured eye-ball and this additional factor would have pushed up compensation still further. The matter does not, however, rest merely at that, because the Appellant has not only suffered loss of vision and disfigurement but also a permanent disability affecting the entire left side of his body. He is experiencing difficulty in speech. His gait is not normal and he has to depend on somebody to help him in his daily routine. Chances of matrimony are also severely affected. The scale of pain and suffering and loss of amenities and enjoyment of life with all these disabilities and limitations would be much higher. Even if hemiplegia with 30% to 40% permanent disability were the only tragic consequence of the accident, a liberal award would have been required to be made under this head. When in Amul Ramchandra Gandhi Vs. Abhasbhai Kasambhai Diwan and Others, , a sum of Rs. 25,000/- was awarded under this head in the case of a young boy aged 12 whose right leg above the ankle had been amputated, a higher, if not a substantially higher, amount would have been required to be awarded for permanent malfunctioning of the entire half side of the body.

23. Bearing in mind all the circumstances of the case and taking an overall view of the scale of pain and suffering and loss of amenities and enjoyment of life resulting from multiple injuries, it appears to us that an award in the sum of Rs. 55,000/- under this head would be just, proper and adequate. For the disfigured and disjointed physical frame with which the Appellant will have to learn to live for over half a century and for the pain, un-sightliness, inconvenience and lost pleasures and amenities of life, an award in the aforesaid sum would be the just compensation.

III. Pecuniary Loss.

24. Next comes the compensation under the head of pecuniary loss. As held in Amul Ramchandra Gandhi Vs. Abhasbhai Kasambhai Diwan and Others, , this loss is divisible in two categories one negative and another positive. In the first category falls the deprivation of earnings or other items which would have been received but for the accident and have now been taken away. In the second category is comprised the new positive burden of expenses required to be incurred as a result of the accident. So far as the assessment under the first sub-head in the case of a very young child who has not yet reached an age to pursue a career or to be employed gainfully is concerned, what has to be borne in mind is that the compensation has to be awarded not for the loss of future earnings but for the loss of earning capacity. What is awarded in such cases by way of damages is truly a compensation for a disability or, to put it differently, for destruction or diminution of a capital asset, albeit of a limited duration. For the assessment of such loss, an estimate of the probable future earnings had there

been no accident and the actual earning power left after the accident has to be made. The difference between the two is the loss of earning capacity. The subject matter of estimation is very much what is often called "a series of imponderables" and what has somehow to be quantified in assessing damages is the present value of the risk that a claimant will, at some future time, suffer financial damage because of his disadvantage in the labour market. The probability or risk of loss of earning capacity must, however, be substantial and real and the damages must be assessed and quantified, having regard to all sorts of variable factors, favourable and unfavourable which, in a particular case, will or may, be relevant see Ahmedabad Municipal Corporation and Another Vs. Niranjan Ambalal Patel and Others, . It is not easy to make such an estimate in the case of young boy about whose prospective earning and probable loss one has only to make an estimate-after a very rough estimate-based purely on guess work. So far as the other subhead, namely, the new positive burden of expenses to be incurred as a result of the accident is concerned, the cost of medical expenses, if any, which the injured person might be required to incur in future and his need of nursing and constant attendance and extra nourishment, if any, will have to be taken into account see Amul Ramchandra Gandhi Vs. Abhasbhai Kasambhai Diwan and Others, .

25. In the instant case, it appears that the Tribunal has awarded compensation by taking into account only the loss suffered under the first sub-head. It has not at all awarded any compensation for the prospective loss under the second subhead. The Tribunal appears to have taken the view, contrary to the medical evidence and the evidence of the Appellant''s father, that the Appellant does not and will not require assistance of any person in the day to day chores of his life and it is for that reason that it appears to have ignored the new prospective burden of expenses. So far as the first sub-head is concerned, the Tribunal, although it found that the disabilities and limitations flowing out of the different injuries will prove to be a handicap in the future progress of the Appellant, has awarded a sum of Rs. 18,000/- only as compensation on the basis that the Appellant would have ordinarily earned atleast Rs. 200/- per month and that on account of the injuries his earning capacity would suffer to the extent of 50% and that, therefore, his economic loss was to the extent of Rs. 100/- per month, that is to say, Rs 1,200/- per year and applying the multiplier of 15 the loss was quantified at Rs. 18,000/-. Here, too, in our opinion, the assessment of the Tribunal is based on a gross under estimate.

26. The Appellant''s father is a matriculate. He thereafter joined cotton weaving course and took two years technical training. He appears to have joined service thereafter and on the date of the trial his total emoluments per month were Rs. 775/-. The Appellant himself was studying in the third standard at the time of the accident. He was promoted to next higher standard but when he resumed study, he failed in the examination of that standard. It would thus appear that his academic career has been to some extent, affected as a result of the accident. He appears to have been an average student but it would not be

unreasonable to assume, having regard to his family background, that he would have successfully completed a degree course and would have then taken up some employment. However, on account of the accident, it cannot now be safely assumed that he would be able to complete his studies. In any case, it cannot possibly be doubted that even if he completes the study, in the labour market he would be at a disadvantage as compared to any other person with normal eye sight and physical frame. Finding an employment will not, therefore, be an easy task for him any longer. He does not seem to possess any special skill and with his physical handicap it would be difficult for him to acquire any such special skill in future. In the case of the Appellant, therefore, it cannot possibly be doubted that there is a substantial and real loss of earning capacity as a result of the injuries received by him.

27. It is not an easy task to make an estimate of the present value of the probable financial damage which the Appellant is likely to suffer as a result of the injuries. The compensation awardable under this head must necessarily take into account not only the deprivation of earnings on account of loss of earning capacity but also the prospective burden of expenses to be incurred in view of the Appellant''s need of constant attendance. As observed in Amul Ramchandra Gandhi Vs. Abhasbhai Kasambhai Diwan and Others, , under such circumstances, the best method to adopt would be to make a global assessment under both the sub-heads and to award compensation for pecuniary loss taking into account all the relevant factors.

28. There is no manner of doubt that in these days, to assess prospective income of a boy aged about 12 with the history and family background of the Appellant at a steady figure of Rs. 200/- per month is to make a gross under estimate. As earlier pointed out, the Appellant would, in all reasonable probability, have completed a graduation course and taken to some employment. In the full span of his future working life, which could be estimated to be atleast 35 years, even if the Appellant had started at the monthly emoluments of Rs. 200/-, he could legitimately be expected to have earned, in course of time, atleast Rs. 1,000/- per month at the end of his working life. Now, as a result of the accident, the Appellant''s eligibility for employment is considerably reduced. According to the medical evidence, the permanent disability which he has suffered on account of hemiplegia alone is 40% for the upper left limb and 30% for the lower limb. Besides, one has also to take into account the disability flowing from the loss of vision in one eye. It also cannot be said with certainty that the academic career would run a smooth course and that the Appellant would be able to obtain graduation. That might be an additional handicap in his way in securing employment. There is no possibility also of the Appellant acquiring any special skill so as to enable him to compensate for his probable loss of academic career. At the same time, however, it would be difficult to say that he would not be gainfully employed at all in spite of his handicap. Taking into account all relevant circumstances, it would not be unreasonable to assume that in course of time he would find atleast some employment which would yield him income which may

not stand comparison with what he would have otherwise earned but which would atleast keep him going in life. These are the factors which must be taken into account in estimating the compensation under the first sub-head. As regards the compensation under the second sub-head, although the evidence on record is not very satisfactory with regard to the actual expenditure incurred in providing attendant''s service to the Appellant, it cannot be gainsaid that atleast for a few years to come, the Appellant would need the assistance of somebody in diverse chores of life. Some expenditure on this count cannot be altogether ruled out. It appears to us, having regard to all the circumstances of the case, that the present value of the prospective loss of the Appellant can safely be estimated at Rs. 350/- per month, that is to say, at Rs. 4,200/- per annum. It would take care of every conceivable and relevant factor. In case of a young boy aged about 12, the multiple to be adopted cannot be less than 15. On the aforesaid basis, the economic loss of the Appellant would come to Rs. 63,000/- and compensation under this head must be in the said sum. We are unable to uphold the award in the sum of Rs. 18,000/- made by the Tribunal.

29. We accordingly hold that the Appellant is entitled to additional compensation as under as a result of the foregoing discussion:

Loss of income of father for providing services to the Appellant. Rs. 1,200/-

Pain and suffering and loss of amenities and enjoyment of life. Rs. 39,000/-

Pecuniary loss. Rs. 45,000/-

Total Rs. 85,200/-

The claim in appeal, however, is restricted to Rs. 62,443/. The actual award, therefore, can only be in the sum of Rs. 62,443/-.

30. The appeal accordingly fully succeeds with costs. The Appellant will be entitled to the additional compensation in the sum of Rs. 62,443/-, with interest at the rate of 6% per annum from the date of the claim petition till payment and costs throughout. The third Respondent shall deposit the said amount in the Tribunal within a period of two months from today. Out of the said amount, the Tribunal will forthwith arrange to have the amount of Rs. 60,000/- together with proportionate interest accrued due thereon deposited in a fixed deposit with a nationalised bank for a period of ten years on the condition that the Appellant will not be entitled to withdraw the amount before the due date nor will it be open to him to raise any loan against the fixed deposit without the prior permission of the Tribunal. Half of the interest accruing due on the fixed deposit will be reinvested from time to time and the remaining half shall be paid to guardian of the Appellant for his care and maintenance. The balance of the awarded amount including the amount of costs and proportionate interest will be paid over to the guardian of the Appellant after due identification.