

(2012) 12 GUJ CK 0109
In the Gujarat High Court
Case No : First Appeal No. 599 of 2003

Babubhai Gopaldas Shah and 4

APPELLANT

Vs

Rajbirsinh Umaravsin Chaudhari and 2

RESPONDENT

Date of Decision : 20-12-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 173

Citation : (2012) 12 GUJ CK 0109

Hon'ble Judges : G.R.Udhwani, J;D.H. Waghela, J

Bench : Division Bench

Advocate : Mohini Bhavsar for Mr. Bharat Jani, for the Appellant; Nachiket Mehta for Ms. Megha Jani, Advocate for the Defendant No. 3 and Rule Served for the Defendant Nos. 1 - 2, for the Respondent

Judgement

Honourable Mr. Justice G.R. Udhwani

1. Aggrieved by the judgment and award dated 28th January, 2002, made by the Motor Accident Claims Tribunal (Auxii), Ahmedabad (Rural) in M.A.C.P. No. 1772 of 1991 instituted by heirs of deceased Tusharbhai Babubhai Shah u/s 166 of the Motor Vehicles Act 1988 (for short "the Act") claiming a compensation in the sum of Rs. 35.00 lacs on various counts, the appellants - original claimants are before this Court in appeal u/s 173 of the Act. It was the case of the appellants that the accident in question had taken place wherein their bread-winner Tusharbhai Babubhai Shah lost his life on account of rash and negligent driving of truck bearing Registration No. GQB -7059 by the first opponent. The Tribunal allowed their claim only for Rs. 3,13,000/-. The appellants in this appeal pray for enhancement of said compensation to Rs. 35.00 lacs.

2. Short facts relevant for the purpose of this appeal are as under:-

2.1 It was pleaded before the Tribunal that, on 5.11.1991 between 12:00 to 1:00 p.m., deceased Tusharbhai was coming from Bharuch to Ahmedabad by driving his Car No. GBW -615, and when he reached opposite to Vishala Hotel on Narol

Sarkhej road between 12:00 p.m. to 1:00 p.m., the opponent No. 1 came with the truck bearing Registration No. GQB-7059 from the opposite side in full speed and in rash and negligent manner on the wrong side of the road, and dashed the front right portion of the truck against the car the deceased was driving; badly damaged it, caused serious injuries to Tusharbhai, who, after being treated in V.S. Hospital for sometime succumbed to the injuries.

3.2 It was pleaded before the Tribunal that the deceased was employed in Gujarat Narmada Electronics Limited as Senior Manager (Finance) and was drawing Rs. 12,000/- per month, as also other benefits like furnished quarters, car allowances, earned leave, provident fund etc., and thus, it was pleaded that the total monetary benefits received by the deceased were Rs. 15,000/- per month. Based upon such pleadings, a sum of Rs. 35.00 lacs was claimed as compensation.

3.3 The opponents, in response to the notice, appeared before the Tribunal, but it is opponent No. 3 only who contested the case.

3.4 The Tribunal, on the basis of the pleadings, framed appropriate issues, fixed 50% responsibility on each of the vehicalars after appreciation of evidence adduced before it.

3. In pursuance to the notice issued by this Court, learned advocate Mr. Nachiket Mehta for learned advocate Ms. Megha Jani appeared for respondent No. 3. The first two respondents have not appeared. The appeal was admitted on 13.07.2004.

4. We have heard learned advocates for the appellants as well as opponent No. 3. Learned advocate for the appellants, while inviting our attention to the panchnama of the place of incident at Exh.32, submitted that the driver of the truck was not examined, and contents of the panchnama describing the situation after the accident spoke for itself inasmuch as there was considerable damage on driver side of the car and there was negligible damage on the driver side of the truck, and therefore there was a room for adverse inference against the truck driver and principle of *res ipsa loquitur* ought to have been applied and the Tribunal was not justified in fixing 50% liability as contributory negligence on the part of the deceased in absence of a reliable evidence against the deceased. Reliance is placed upon the case of *Usha Rajkhowa and Others Vs. Paramount Industries and Others*, in support of the said contention.

5. Learned advocate for the opponent No. 3 submitted that the panchnama shows that the truck was near the gate of Vishala Hotel which is towards the eastern border of the road and the left front and rear wheels of the truck are on the kachcha strip of the road; that right wheels are at a distance of one feet from the eastern border of the road; that from the rear wheels of the truck, brake marks are seen upto a distance of five feet and the panchnama makes it clear that right side of the car driven by the deceased had dashed against the right side of the truck. He, therefore, submitted that the conclusion drawn by the

Tribunal that deceased Tusharbai was also responsible for the accident must be sustained in this appeal.

6. To appreciate this contention, we may refer to the findings recorded by the Tribunal and then to the evidence on record on this count.

7. The Tribunal from Panchnama Exh.32 noticed that the accident has taken place opposite to Hotel Vishala and the offending truck was lying on the side of the road with the damage on its front portion driver side and that it has dashed against the fiat car. That there was substantial damage to the car i.e. Rs. 80,000/- against the damage of Rs. 10,000/- to the offending truck. As the driver of the offending vehicle i.e. truck was not examined, the Tribunal drew adverse inference against him holding that he also might have contributed to the occurrence.

8. We may now turn to oral testimony of the eye-witness examined at Exh.41. The witness deposed that he and his friends were going towards Vasna from Narol via Vishala on their vehicles i.e. scooter and, at that time, one fiat car was going ahead of the scooter at the distance of 200 feet on the left side of the road and the truck bearing Registration No. GQB 7059 was coming from the opposite wrong side in full speed and dashed against the car.

9. Keeping this testimony in mind, we may now refer to the Panchnama as well as the sketch produced alongwith it showing the situation at the place of accident after the occurrence.

9.1 On the eastern side of the road, where accident occurred, Vishala Hotel is situated. Opposite to Hotel Vishala, the offending truck facing Shashtri bridge is found with both of its driver side wheels almost on the edge of the road. There is a dent on it made on account of the impact of the accident. Behind rear right side wheel upto a distance of about 5 feet, there are break marks. Behind the truck on the western side road, at the distance of 25 feet, a car is found with accidental damage. Spare parts and other parts of both the vehicles are found around both of them. Blood stains near the driver side of the vehicle are also found.

9.2 The most important fact that emerges from the Panchnama is the break marks of the offending vehicle which is found on the extreme left side of the road. Now, if both the vehicles were coming from their respective opposite direction, and if, the truck was on the wrong side of the road, in our opinion, the break marks would have been somewhere on the wrong side of the road i.e. near the car and not on the other half part of the road. The eye-witness has failed to explain this aspect and the truck driver who was the only person available to explain this position, was not examined. In our opinion, therefore, there was no other option with the Tribunal, but to fix equal liability on both the vehiculars. Reliance is however placed on the case of Usha Rajkhowa & Ors. (Supra). It has been submitted by the learned Advocate for the appellant that this was a fit case where the principle of *res ipsa loquitur* could have been applied.

9.3 We have perused the said authority, but we are not in agreement with the argument advanced by the learned Advocate for the appellants. In the case of Usha Rajkhowa & Ors. (Supra), the fact situation was totally different. No case for contributory negligence was pleaded. But the Tribunal had attributed 50% of the negligence to each of the two vehiculars in the said case. Further, in the instant case, there is evidence on record in the form of Panchnama showing that both the vehicles were on their correct side, but there were break marks behind the rear wheel of the truck upto 5 feet in a straight line, which fact has not been explained by the eyewitness. However, since occurrence of the accident involving the two vehicles was not seriously disputed, and the Act being the beneficial legislation with an object of helping the victim of accident, in our opinion, in the facts and circumstances of the case, the Tribunal was justified in drawing inference fixing equal liability of both the vehiculars.

10. So far as the quantum is concerned, the Tribunal, after considering the oral and documentary evidence on record found from salary certificate of the deceased -Tusharbhai that the deceased was a Senior Manager (Finance) and was drawing a salary of Rs. 7505/- per month at the relevant time and taking into consideration the said figure, proceeded to ascertain the dependency loss. However, in the oral evidence, PW No.1, who was a power of attorney holder of the petitioner and brother-in-law of deceased -Tusharbhai, stated that deceased was earning Rs. 12,000/- per month. Except this bare statement, he did not explain as to how the deceased was earning Rs. 12,000/- per month. From the record of the Tribunal, we are unable to find any other evidence justifying the claim of the appellants that the deceased was earning more than the above said amount. The Tribunal therefore, could not have taken into consideration Rs. 12,000/- or Rs. 15,000/- for ascertaining the compensation.

11. However, the submission is that Tribunal failed to consider the future prospective income and, therefore, has not awarded just and fair compensation. In support of this contentions, reliance is placed on a decision in case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, . In the said decision the Apex Court, in Para 11 held as under:

11. In Susamma Thomas, this Court increased the income by nearly 100% in Sarla Dixit the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words "actual salary" should be read as "actual salary less tax"]. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being

adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.

12. It can be noticed from the above authority that in case of accidental death of a salaried employees above 40 years having secured job, 30% addition of their last income should be made so as to arrive at the future prospective income of the deceased for just and proper compensation.

13. In the instant case, as noted above, the deceased was employed as Senior Manager (Finance). It is not the case of the opponents that he did not have a secured job. Therefore, we hold that there shall be addition of 30% of the income drawn by the deceased, towards future prospective income.

14. The next argument advanced by the learned Advocate for the appellants is that the actual age of the deceased, at the time of accident, as reflected in the passport produced before the Tribunal was 39 years and that the Tribunal has applied the wrong multiplier by taking into consideration the age of the deceased as 45 years. However, during the course of argument, learned Advocate for the appellants fairly conceded that the contents of the passport produced before the Tribunal were not established and that the Tribunal relied upon the postmortem report to ascertain the age of the deceased. The said PM Report showed that the deceased was 45 years of age and there was no other evidence to the contrary on record of the Tribunal. Therefore, we do not find any error on the part of the Tribunal on this count.

15. However, the submission that against the age of 45 years, multiplier of 10 as applied by the Tribunal is on the lower side seems to have substance, inasmuch as, in the case of Smt. Sarla Verma (supra), the Apex Court after holding that there was inconsistency in the applicability of multiplier, provided a table in paragraph No. 19 pointing out as to what should be the multiplier for the defined age groups, and for the age group of 41 to 45, appropriate multiplier is 14. We, therefore, hold that since deceased was aged 45 years, multiplier of 14 should be applied.

16. In the result, the appeal must succeed in part and it is partly allowed. The judgment and award rendered by the Tribunal shall be modified by adding 30% of the income of the deceased as prospective income and multiplier of 10 shall be substituted with 14. We, therefore, modify the award as under:

Decree be drawn accordingly. If any amount is deposited with the Registry of this Court, the same shall be transmitted to the Tribunal for its disbursement as per the modified award as stated hereinabove. Record & Proceedings be sent to the Tribunal forthwith.