
(2008) 05 GUJ CK 0076
In the Gujarat High Court

Case No : First Appeal No. 299 of 2008 and Cross-Objections No. 50 of 2008

Damyantiben and Others

APPELLANT

Vs

Firozkhan Abdul Rasidkhan Pathan and Another

RESPONDENT

Date of Decision : 01-05-2008

Acts Referred:

Citation : (2009) ACJ 1111 : (2008) 2 GLR 1721

Hon'ble Judges : Sharad D. Dave, J;A.L. Dave, J

Bench : Division Bench

Advocate : Arpit A. Kapadia, for the Appellant; K.K. Nair, for Respondent 2, for the Respondent

Judgement

A.L. Dave, J.—The above-numbered First Appeal and Cross-Objections arise out of the judgment and award rendered by the Motor Accident Claims Tribunal (Auxi.), Fast Track Court No. 4, Bharuch, in Motor Accident Claim Petition No. 528/2004, on 6th September, 2007.

2. The claim-petition was preferred by the appellants for getting compensation for accidental death of Babubhai Chhotubhai Vasava in an accident that occurred on 10th July, 2004 at 12.30 P.M. on Ankleshwar - Valia road near Karjan Colony. As per the case of the claimants, the deceased had started from home on his motorcycle, bearing Registration No. GJ-16-Q-3844. He had stopped at the place of the accident for attending to nature's call and while he was returning towards the motorcycle thereafter, Tempo bearing Registration No. GJ-16-V-4209, which was being driven by respondent No. 1 in a rash and negligent manner, came from behind and knocked him down while attempting to overtake from the left hand side. Because of the impact, the deceased suffered injuries on the right side of his head and right side of his body and ultimately, succumbed to the same. The claimants, therefore, preferred the said claim-petition claiming Rs. 33 lakhs as compensation, which was, later on, enhanced to Rs. 48,50,000/-.

2.1 According to the claimants, the deceased was aged 37 years. He was working

with O.N.G.C. and was drawing a monthly salary of Rs. 24,000/-. He was the sole bread-earner in his family. The claimants have lost in him a husband, a father and a son. According to the claimants, the deceased had a bright future and, therefore, they claimed compensation as stated above.

2.2 Respondent No. 1, who is the owner-cum-driver of Tempo No. GJ-16-V-4209, appeared through advocate and filed written-statement in the form of denials only. He has not advanced any theory to explain as to how the accident occurred.

2.3 Respondent No. 2, insurer of the vehicle, also appeared through advocate and filed written-statement, which is also in the form of denials of the averments made in the claim-petition.

3. The Tribunal, after considering the evidence, came to the conclusion that the deceased was responsible to the extent of 10% towards the cause of accident, whereas respondent No. 1 was responsible to the extent of 90% for causing the accident. The Tribunal considered the income of the deceased to be Rs. 13,748/-, assessed the prospective income of the deceased at Rs. 20,622/-, assessed the monthly dependency loss at Rs. 13,748/- and adopted a multiplier of 11 years, resulting into the compensation of Rs. 18,14,736/- under the head of dependency loss. The Tribunal also awarded compensation of Rs. 10,000/- for loss of life, Rs. 10,000/- towards consortium and Rs. 7,000/- towards funeral expenditure, totalling to Rs. 18,41,736/-, and after deducting 10% therefrom as contribution of the deceased towards the cause of accident, held that the claimants were entitled to the compensation of Rs. 16,57,563/- with interest at the rate of 9% per annum and proportionate costs.

4. The appellants, who are the original claimants, are aggrieved for the reasons that the Tribunal, while considering the dependency loss, has not taken into consideration the allowances, which were drawn by the deceased, but, has accepted only the basic salary and dearness allowance as the income of the deceased. According to the claimants, the Tribunal ought to have assessed the dependency loss to the claimants at Rs. 41,000/- per month and multiplier of 17 ought to have been adopted, and Rs. 25,000/- for loss of life, Rs. 25,000/- towards consortium and Rs. 10,000/- towards funeral expenditure ought to have been awarded by the Tribunal. They have, therefore, approached this Court for enhancement of the Award.

4.1 The appellants also challenge the finding of the Tribunal on negligence aspect. According to them, no negligence ought to have been attributed to the deceased by the Tribunal looking to the material on record.

5. Respondent No. 2, insurer of the vehicle, have filed cross-objections, wherein the cross-objector also challenges the award on the ground of negligence, by contending that the deceased ought to have been held responsible for the accident to a greater extent.

5.1 Cross-objections are also filed to challenge the quantum aspect by

contending that the evidence adduced by the claimants is not sufficient so far as the income and the prospects of the deceased are concerned.

6. The evidence that is produced at Exh.34 is only a computerized sheet and no authenticity can be attached to it. According to learned Counsel Mr.Nair, it is not signed by anyone. It is issued for a period of 13 months. There is nothing to show the qualifications of the deceased and to show his prospects. It is further contended by Mr.Nair that no evidence is produced to show whether the income tax was deducted at source from the salary and the statement in Form No. 16(A) is not produced. Income Tax returns are also not produced and, therefore, the Award made by the Tribunal on this foundation is erroneous and may appropriately be reduced.

7. With the consent of learned Counsel for the parties, we have taken up this appeal for final hearing considering the narrow question arising for determination.

8. We have examined the record and proceedings of the case. What emerges from the record and proceedings is that respondent No. 1, driver-cum-owner of the Tempo has not contested the claim-petition before the Claim-Tribunal after filing a formal written statement. He has neither cross-examined the witnesses of the claimants, nor has he adduced any oral evidence. It also appears that the claimants have not examined any eye witness to the incident, and the driver-cum-owner of the vehicle has also chosen not to enter into the witness-box. We, therefore, do not have any oral evidence to know as to how the accident occurred. We have, therefore, to fall back on the F.I.R. and the panchnama, which is the only material available with us on this aspect.

8.1 On reading the F.I.R. Exh.23, it is clear that it was given by the brother of the deceased, who does not claim to be an eye-witness to the incident. He has no personal knowledge about the accident. No other witness is examined by any of the parties, who can throw some light on the question as to how the accident occurred to enable the Court to determine who was responsible for the accident and to what extent.

8.2 If we examine the panchnama Exh.24, it would go to show that the motorcycle was damaged on its front head-light and right side rear-view-mirror. It would also go to show that the Tempo was also damaged on left hand side.

8.3 It is canvassed by learned advocate Mr.Kapadia for the appellants that the deceased while trying to ride the motorcycle, after attending to nature's call must, have been hit by the Tempo coming from behind and, therefore, the injuries found on his person are on right side only. No negligence, therefore, could have been attributed to the deceased.

8.4 On the other hand, learned Counsel Mr.Nair submitted that if the panchnama is seen, it is clear that the motorcycle suffered damage on its right side and the Tempo suffered damage on the left side of its cabin, which would mean that the motorcyclist may have tried to overtake the Tempo from left side and, therefore,

more negligence ought to have been attributed to the deceased who was riding the motorcycle.

9. In our view, the evidence on record is very cryptic. The claimants have not examined any eye witness, and the driver of the Tempo, who could have been the best person to say as to how the accident occurred, has chosen not to depose and, therefore, there is no evidence on the question as to how the accident occurred. The description in the panchnama would only indicate the position of the vehicle and the site of the incident after the incident, and from that, the Court has to draw some inference.

9.1 In this backdrop, if the panchnama is seen, it reveals that the motorcycle was lying on the right side of the road. It was damaged on its right side, and the Tempo was damaged on its left side. This indicates two possibilities; (i) that the motorcyclist tried to overtake the Tempo from left side, and (ii) that the Tempo-driver tried to overtake the motorcyclist from his right side. It is also clear that in that event, two vehicles came so close to each other that there was a crash between the two, resulting into damage to the cabin of the Tempo on its left side. In this set of circumstances, we are of the view that the assessment made by the Tribunal cannot be considered to be grossly erroneous or arbitrary or perverse and does not call for any interference so far as the finding on the aspect of negligence is concerned.

10. So far as the negligence aspect is concerned, learned Counsel Mr.Nair relied on the decisions rendered in the cases of (i) The Municipal Corporation of Greater Bombay Vs. Shri Laxman Iyer and Another, , and (ii) Renukadevi H. Etc. Vs. Bangalore Metropolitan Transport Corporation Etc., . It is clear from the reading of these judgments that even a cyclist or scooterist vis-a-vis a bus driver has been held responsible for the accident to the extent of 25% or 50%. But, we notice that in both the said cases, there was sufficient evidence on record to show as to how the accident occurred. In the instant case, there is no evidence to show as to how the accident occurred. The only evidence is that the accident occurred and what was the position of the place of the incident after the incident. Therefore, the judgments cited by the learned Counsel Mr.Nair cannot be of any help to the cross-objector, and we confirm the finding of the Tribunal on negligence aspect.

11. Now, coming to the quantum aspect of the case, an objection is raised by the cross-objector, saying that the Tribunal has accepted the age of the deceased to be 37 years in absence of any cogent evidence to this effect. The deceased was working in an organization like O.N.G.C. and, therefore, he would certainly have several documents to show his date of birth, which he has failed to produce and there is no evidence to determine the age of the deceased to be 37 years. On the other hand, it is contended that the wife of the deceased has deposed before the Tribunal about the age of the deceased, which is not challenged or contradicted by the other side. The postmortem notes also indicate the age of the deceased to be 37 years.

12. In view of the fact that the claimants' case has been consistent that the deceased was aged 37 years and it has been so deposed by claimant No. 1 (wife of the deceased), which part has not been challenged in the cross-examination at all, no error can be said to have been committed by the Tribunal while accepting the age of the deceased to be 37 years. Strict rules of proof and evidence are not required to be followed in such litigation where approach has to be of rendering justice in substance.

13. So far as the computation of dependency loss to the claimants is concerned, the Tribunal has assessed the income of the deceased at Rs. 13,748/- comprising of basic pay of Rs. 9848/- and dearness allowance of Rs. 3900/-. If Exh.34 is seen, it is clear that the deceased was earning Rs. 9848/- by way of basic pay and Rs. 3900/- as dearness allowance. In addition thereto, the deceased was getting Rs. 1550/- by way of Drilling Site Compensatory Allowance ("DSCA" in short) and Rs. 2215/- by way of H.R.A., besides some petty allowances. The Tribunal has ignored DSCA and HRA while computing monthly income of the deceased for assessing the dependency loss to the claimants. In our view, the Tribunal has committed an error in not including in the income of the deceased DSCA and HRA (National Insurance Company Ltd. Vs. Indira Srivastava and Others, The income of the deceased, therefore, would be Rs. 9848/- basic pay, plus Rs. 3900/- dearness allowance, plus Rs. 1550/- DSCA, plus Rs. 2215/- HRA, totalling to Rs. 17,513/-.

13.1 Heavy objection was raised by learned advocate Mr. Nair on behalf of the cross-objector against exhibition of the above-referred to statement at Exh.34, and a doubt about its authenticity was raised. However, we find that this document is produced with list Mark 31/3 and it has been admitted in evidence by virtue of an endorsement made by the learned advocate for the cross-objector i.e. insurer before the Tribunal admitting the document and its exhibition. The cross-objector, therefore, now cannot challenge the authenticity or genuineness of the said document. It is a computerized sheet on the stationery of O.N.G.C. and there is no reason to doubt the same. It is clear from the evidence that the deceased was working with O.N.G.C. on regular pay-scale. This would indicate the prospective rise in his income even if chances of his promotion are ignored. The prospective rise in income, therefore, has to be considered. The usual principle is to add two folds the income of the deceased to the income of the deceased at the time of his death and then to divide the same by two, which would bring an amount of Rs. 26,269.50 ps. which can be rounded off Rs. 26,270/- as prospective income of the deceased. Out of this, 1/3rd of the income will have to be deducted as expenditure by the deceased on himself as a rule of thumb, which would be Rs. 8756.50 ps. The resultant figure would be Rs. 17,513/-, which would be the net dependency loss per month to the claimants.

13.2 At this stage, we may also consider the contention raised by learned advocate Mr. Nair that Income Tax should be deducted from the income of the deceased and thereafter dependency loss may be assessed, after deducting

1/3rd from the remaining income. We are unable to accept this contention. When 1/3rd of the income of the deceased is deducted as expenditure on self, by rule of thumb, that would take care of the expenditure that the deceased would be required to incur on his vocation; so also the tax liability. If that view is not taken and the view pressed by learned Counsel Mr.Nair is accepted, the result would be that a sizeable amount would be deducted from the income of the deceased by way of payment of tax, and from the remainder, 1/3rd would be deducted, which would also be a sizeable amount. Ordinarily, a salaried person with family cannot afford to spend so lavishly on himself by spending 1/3d of his income at the costs of maintenance of the family. A salaried man has hardly to spend on his vocation. The Indian society and the Indian culture, as it is, is known for mind frame of the people of sacrificing one's own need for the needs of the family, and if what is canvassed by learned advocate Mr.Nair is accepted, it would be taxing a family doubly, under the head of deduction for Income Tax and for expenditure on self.

13.3 We may refer to what is observed by the Apex Court in Smt. Sarla Dixit and another Vs. Balwant Yadav and others, , to draw support for our view. In the later part of para-6, the Apex Court has observed thus:

From that gross monthly income, at least 1/3rd will have to be deducted by way of his personal expenses and other liabilities like the payment of Income Tax, etc.

13.4 This means that when we apply rule of thumb and deduct 1/3rd from the gross prospective income of the deceased, it takes care not only of the expenditure that the deceased would incur on himself, but, would also take care of his personal responsibility towards payment of tax and the expenditure which he may be required to incur for his vocation. Therefore, we are not able to accept the contention raised by learned advocate Mr. Nair in this regard.

14. The Tribunal has erred in not considering the perks drawn by the deceased in view of the decision of the Apex Court rendered in the case of National Insurance Company Ltd. Vs. Indira Srivastava and Others, , wherein it is observed thus:

19. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted.

14.1 Learned advocate Mr. Kapadia for the appellants submitted that if the above-quoted judgment is seen, it is clear that in the deduction, by rule of thumb, 1/3rd of the salary of the deceased was made, as observed in the last line of para-19.

15. In our view, if the principles emerging from the decision in the case of Sarla Dixit and Anr. (supra), and what is observed in the case of Indira Srivastava

(supra) are harmoniously read, they would go to show that the Income Tax payable has to be deducted from the income of the deceased while assessing the dependency loss and when you deduct 1/3rd of the income, it includes the deduction towards Income Tax and, therefore, there is no need for separate deduction of Income Tax and 1/3rd of the gross salary while assessing dependency loss.

16. Now, going back to the original position where we have assessed the prospective income of the deceased at Rs. 17,513/- per month, the annual dependency loss to the claimants would be Rs. 2,10,156/-. The age of the deceased was 37 years, which we have held to have been rightly accepted by the Tribunal in the earlier part of this judgment. If a multiplier of 14 can be adopted in light of the decision in the case of Tamil Nadu State Transport Corporation Ltd. Vs. S. Rajapriya and Others, , an amount of Rs. 29,42,184/- would be arrived at as compensation under the head of dependency loss. Neither side has agitated the compensation awarded under the non-pecuniary heads by the Tribunal, which are, Rs. 10,000/- for loss of life, Rs. 10,000/- towards consortium and Rs. 7,000/- for obsequial ceremonies, which would be added to the above amount totalling to Rs. 29,69,184/- as total amount of compensation that the claimants would be entitled to.

16.1 However, since we have upheld the finding of the Tribunal that the deceased himself was negligent to the extent of 10% towards the cause of accident, 10% of the said amount will have to be deducted therefrom, which would be Rs. 2,96,918.40 ps. The end figure of the compensation that the claimants would be entitled to get, would be Rs. 26,72,013.60 ps., which can be rounded off Rs. 26,72,000/-, with proportionate costs and interest at the rate of 9% per annum, as against Rs. 16,57,563/- awarded by the Tribunal.

17. Learned advocate Mr. Kapadia urges that the cross-objector may be directed to deposit the awarded amount at the earliest, latest within six weeks from today. Against that, learned Counsel Mr. Nair stated that since the amount involved is large and beyond the sanctioning limits of the Office at the highest office at Baroda, the matter will have to be sent to Head Office for sanctioning the same and it may take time. He, therefore, prays for a period of at least four months. It would be reasonable to expect the cross-objector to deposit the amount of compensation with costs and interest within ten weeks from the date of receipt of the certified copy of this judgment, provided the certified copy is applied for within a period of one week from today.

18. So far as the disbursement part is concerned, it is directed that the amount that may be or may have been deposited by the cross-objector, shall be disbursed to the claimants in the ratio of 5:1:1:1:1:1 amongst the six claimants.

18.1 Out of the amount going to the share of claimant No. 1 - Damyantiben, 30% shall be paid to her by crossed A/c. Payee cheque and the rest of the amount going to her share shall be placed in a term deposit in any nationalized

Bank for a period of seven years and the periodical interest that may accrue thereon shall be receivable by her.

18.2 The amount going to the share of minor claimants i.e. appellant Nos.2,3,4 & 5 shall be placed in any nationalized Bank in a term deposit through their mother and guardian Damyantiben (claimant No. 1) for a period of eight years and the periodical interest that may accrue thereon shall be receivable by claimant No. 1-Damyantiben for the benefit of minors.

18.3 Out of the amount going to the share of claimant No. 6-Surajben (mother), 30% shall be paid to her by crossed A/c. Payee Cheque and the rest of the amount shall be placed in a term deposit in any nationalized Bank for a period of five years, and the periodical interest that may accrue thereon shall be receivable by claimant No. 6.

There shall be usual direction about non-grant of loan against term deposits and non-creation of any encumbrances thereon.

Accordingly, the appeal stands partly allowed and the cross-objections stand rejected. There shall be no orders as to costs. Awards accordingly. D.S. Permitted to the appellant.