

(2016) 07 GUJ CK 0045
In the Gujarat High Court
Case No : First Appeal No. 2459 of 2007

Gujarat Construction Co.

APPELLANT

Vs

Jayesh Amrutlal Nanda

RESPONDENT

Date of Decision : 20-07-2016

Acts Referred:

Citation : (2017) AAC 160 : (2017) 1 ACC 621 : (2016) 3 GCD 2597 : (2017) 2 GLR 1261 : (2017) 2 TAC 293

Hon'ble Judges : Mr. S.G. Shah, J.

Bench : Single Bench

Advocate : Mr. Dakshesh Mehta, Advocate, for the Appellant No. 1; Mr. Haresh N. Joshi, Advocate, for the Defendant No. 1; Mr. Palak H. Thakkar, Advocate, for the Defendant No. 3; Rule Served, for the Defendant No. 2

Final Decision : Allowed

Judgement

Mr. S.G. Shah, J. - Appellants are owner and insurance company of the vehicle involved in an accident wherein respondent No. 1 has received grievous injuries. Respondent No. 2 is driver of the vehicle in question. Initially appellant No. 1 owner of the vehicle has filed this appeal and since insurance company also wants to challenge the same judgment and award and since insurance company was joined as respondent No. 3 in the appeal, as prayed for by both of them respondent No. 3 is permitted to be transposed as appellant No. 2.

2. The appellants being driver, owner and insurer of the truck No. GRX 5157, which was involved in an accident have challenged the judgment and award dated 17.08.2006 by the Motor Accident Claims Tribunal (Aux) of Jamnagar in Motor Accident Claim Petition No. 177 of 1992. The main grievance and ground in the appeal is regarding quantum of compensation awarded by the tribunal, when tribunal has against a claim of Rs. 20,00,000/- awarded Rs. 25,10,322/- as total compensation on different heads as under:

Rs. 2,00,000/-

Pain and suffering and loss of enjoyment of life

Rs. 5,25,982/-

Expenses for medicines, X-rays, reports, blood, artificial limbs and charges of hospitals and limb centers

Rs. 1,61,400/-

Charges for operations, doctors' visit and attendance by nurse

Rs. 70,000/-

Charges for artificial limbs in future

Rs. 1,50,000/-

Transportation

Rs. 1,33,800/-

Expenses for attendants

Rs. 50,000/-

Rich diet

Rs. 2,40,000/-

Actual Loss of income

Rs. 9,79,200/-

Future Loss of income

3. In addition to grievance on quantum of compensation awarded by the tribunal, other major issue raised by the appellants is regarding contributory negligence of the victim himself when two vehicles are involved in the accident, because the tribunal has held that the driver of the truck was solely responsible for causing this accident. Therefore, before scrutinising that whether awarded amount is just and proper or not, it would be appropriate to first scrutinise the issue regarding negligence.

4. For the purpose, material evidence on record is in the form of complaint at exhibit 79, panchnama of place of accident at exhibit 80 and deposition of the victim and claimant at exhibit 91, so also deposition of driver of the truck in question at exhibit 139.

5. If we peruse the complaint at exhibit 79, the complainant Amratlal Mohanlal Bhanushali is father of the victim and claimant, and he disclosed the incident to the investigating agency, when he came to know that his son has met with an accident on Victoria Bridge, Jamnagar. It is his say in the complaint that at 2:45 p.m. when he was at his home he received an intimation that his son has met with an accident and he was taken to the hospital of Dr. Falia and admitted there.

Therefore, he had been to the hospital, where on inquiry, victim has conveyed him that when he was driving his scooter towards Jamnagar, a truck came from behind and dashed his scooter with full force and, therefore, he fell down from the scooter and received grievous injuries on different parts of the body, hands, legs, back etc. So complainant is simply disclosing the incident and, therefore, when deposition of victim is available on record we have to rely upon it.

5.1 Whereas exhibit 80 is panchnama of place of incident which does not disclose that when it was drawn except the date i.e. on 18.04.1991 i.e. on the same day of incident. Panchnama discloses that the place of accident is 15 ft. inside the bridge from its west end in the middle of the road Scooter No. GUP 9257 is lying and its front back is towards western end of the bridge. It is further recorded in the panchnama that there are break marks of the scooter on eastern side and there are also break marks of the truck on western side of the place, where scooter was lying. However, there were no break marks on the road but scooter was in working condition. The road is east and west from Rajkot to Jamnagar respectfully and it is 30 ft. wide. Both the sides of the road has wall because of the bridge. Therefore, except a word that scooter is lying on middle of the road, practically the Investigating Officer and panchas have failed to disclose the distance of the place of accident or scooter, which was lying on the road or even break marks from both the sides of the road i.e. towards north and south and from the place of incident, which would be the guiding factor of the inter se negligence of both the vehicles. However one thing is now certain and clear that though claimant has conveyed his father in the hospital that truck has dashed him on his back, probably, it is a head-on collision, because break marks of both the vehicles are on different sides of the road, where scooter was lying. To be more precise, the scooter has also applied the break, so also truck has also applied break before it reached the place where it was dashed with the scooter. Therefore, there are break marks of scooter on western sides of the place where scooter was lying whereas break marks of truck where scooter was lying. Therefore, this would be a case of head-on collision of both the vehicles and, therefore, version of the claimant seems to be incorrect in his complaint as well as in the claim petition.

5.2 In background of above discussion, if we peruse the deposition of the claimant at exhibit 91, now he has categorically stated on oath before the tribunal that on 18.04.1991 when he was driving his scooter from Hapa to Jamnagar to reach his house, a truck has come from behind and dashed him and ran over on his left leg. If it is so, there cannot be a break mark of scooter or both the break marks cannot be on same directions. Therefore, if break mark of both the vehicles are on different directions from the place of incident where scooter was lying, it is head on collision. The claimant is trying to hide such fact so as to avoid proof of his contribution in the incident.

5.3 Whereas during cross-examination, witness has admitted that accident has happened immediately when he crossed the bridge and entered into Jamnagar

city though panchnama shows that incident has taken place at a distance of 15 ft from the western edge of the bridge i.e. on the bridge itself. The witness also admits that bridge is not wide enough and that he has relied upon the complaint registered by his father, which is according to his say to his father. Witness also admits that he was unconscious immediately after the accident.

6. As against that, driver of the truck has deposed on oath at exhibit 137 that no accident has ever taken place as disclosed in the FIR or in the claim petition or that he was not driving the vehicle at the relevant time and that though charge sheet was filed against him for such incident, the Court has acquitted him declaring him as innocent and, therefore, he is not responsible for the incident. Thereby, he categorically deposed on oath that he was not negligent at all or that he was not involved in the accident.

7. As against such evidence on record, if we peruse the impugned judgment, it seems that the tribunal has relied upon a statement of the driver as an accused when we read para 20 of the impugned judgment it is recorded that

"During the course of investigation police has recorded statement of the truck driver, opponent No. 1. This statement is found at Mark 5/4. In his statement the truck driver has specifically admitted that on the date of accident he was driving the truck No. GRX-5157. At the end of Victoria bridge he had hit one scooter No. GUP-9257 and its driver. Out of fear he ran away from the scene of accident with his truck. Later on he came to know that in this accident the scooterist had sustained injuries and his father had lodged complaint before the police."

8. However, on scrutiny of record and proceedings, in list at exhibit 5 it is stated that statement of opponent No. 1 with reference to C.R. No. 206 of 1991 dated 27.05.1991 is produced on record. However, the fact remains that such statement of the accused if recorded by the investigating agency, is not admissible in evidence and it cannot be relied upon at all. To that extent, the tribunal has committed a grave error which resulted into injustice, more particularly, when driver has stepped into witness box disclosing his case at exhibit 139 and while cross ? examining him learned advocate for the claimant before the tribunal did not place such statement and got it confirmed that look you have disclosed above story to the investigating agency, at the relevant time. Therefore, when person who is relied upon by the tribunal to decide the negligence is available for cross-examination and when such statement was not shown to him and thereby it is not proved in accordance with law, such statement which is not proved on record cannot be relied upon. Even other wise as stated above, statement of accused recorded by the investigating agency is not admissible in evidence except it is admitted by the person or to contradict from his other version i.e. other statement or pleadings. Whereas as discussed herein above, the driver has examined himself at exhibit 139 and he categorically denies the commission of offence by him. In that case, the findings by the tribunal regarding negligence certainly needs to be scrutinised properly.

9. The tribunal has, however, relying upon such statement, filed charge sheet for confirming that he is 100% negligence. In that case, again tribunal has failed to realise that from such charge sheet truck driver was acquitted. However, tribunal has also relied the evidence of witness No. 2 namely Amratlal Mohanlal but unfortunately if we peruse such deposition at exhibit 98, nowhere witness has stated that truck driver has dashed the victim on back side of his scooter. Therefore, tribunal has erred in accepting the version of the victim-petitioner. The tribunal has also erred in stating that existence of break marks of both the vehicles would not suffice to prove the involvement of both the vehicles. Therefore, there is reason and substance in the appeal, so as to interfere in the impugned judgment and award and thereby even if victim is negligent by minimum percentage, then also there would be deduction of equivalent amount of such percentage from the total award. Therefore also, there is need to scrutinise that whether award of Rs. 25,10,382/- is just, proper and reasonable or not, more particularly when tribunal has erred in appreciating the issue of negligence in favour of the claimant.

10. In background of above discussion, if we peruse and scrutinise the quantum of compensation awarded to the claimant, it transpires that though tribunal is entitled to award more compensation than compensation actually claimed by the claimant prima facie, tribunal has erred in drawing the award without direction to the claimant to first deposit the difference of court fee stamp for the additional amount of award to the claimant, though such amount is to be paid by the insurance company. This may be considered as technical issue but, it is a legal technicality and, therefore, when there is issue regarding court fee stamp, no Court should let go such technicality before drawing an award of more compensation than claimed, tribunal shall be careful before drawing the award. There must be a direction in the final/operative order or award to first deposit the difference in Court fee stamp before drawing the award and in absence of any Court fee stamp, decree cannot be drawn. To that extent, again impugned order needs to be interfered with.

11. Then comes the consideration of quantum of compensation. While awarding compensation Rs. 25,10,382/- as total amount of compensation, the tribunal has considered that petitioner has suffered grievous injuries on his leg where dressing was continued for 5 months because of infection even after hospitalization for one month with Breach Candy Hospital and Sir Harkishandas Narottamdas Hospital at Mumbai, ultimately there was an amputation of left leg from hip. Therefore, in the case of amputation though consideration of quantum of compensation should be proper and liberal, it cannot be ignored that ultimately claimant should be compensated for the loss suffered by them. Therefore, so far as expenses for medicine, x-rays, report of blood, artificial limbs, hospital charges, limb center charges, operation charges, doctor's fees, so also attendant and nurse charges, transportation charges etc. are concerned, I do not want to enter into those minute details so as to disturb any such amount on any count. Similar is the situation for the award of Rs. 2,00,000/- under the

head of pain, suffering and loss of enjoyment of life because of amputation. However, so far as award on the head of rich diet is concerned, Rs. 50,000/- is awarded. Expenses for attendance charges and actual as well as future loss is concerned, it requires scrutiny because at least for expenses for attendance charges though it is considered as Rs. 1,61,400/- towards charges for operation, doctor visit and attendance charges by nurse, Rs. 1,33,800/- is awarded towards expenses for attendance. If we peruse the relevant discussion on all such count in para 43, the tribunal has recorded that the petitioner has not produced any bill for the charges of doctor and nurse. However, further it is stated that amount of Rs. 1,06,400/- for 133 days at the rate of Rs. 500/- per day for doctor charges and Rs. 300/- per day for nurse seems to be just and reasonable and requires to be awarded. Thereafter though claimant has claimed Rs. 1,35,000/- for three major operation, tribunal has awarded Rs. 55,000/- towards operations.

11.1 So far as attendant charges are concerned, witness has claimed charges for a shoe maker who has travelled with the victim. However, at that time, his father has also accompanied him and, therefore, shoe maker cannot be treated as attendant, when he was taken to Germany to learn to make appropriate shoes according to choice of the claimant.

11.2 The tribunal has in para 24 of the award categorically recorded that though witness has claimed room charges for the people who are coming from Jamnagar for blood etc. petitioner has to spend for their room charges. However, appellant has not produced any bills of such hotel or anything to show that five or six people were attending the victim at a time, which is certainly unwarranted. Therefore, even award for 3 attendants per day at the rate of Rs. 200/- i.e. Rs. 6000/- for 3 months is certainly an exaggerated award. So also the amount of Rs. 50,000/- under the head of rich diet when tribunal has simply stated that it would be quite reasonable considering that petitioner's treatment would last for about two and half years.

11.3 Whereas most material consideration is regarding actual and future loss of income wherein in para 51 of the award, the tribunal has observed that "not any specific proof of income is forthcoming on record to show what the petitioner was earning at the time of accident." However, as per record, it is the say of the victim that he was running steel rolling mill, where about 50 to 60 persons are working and turnover is three to four crore per annum. It is the say of the father of the victim ? PW No. 2 that during income tax raid all books of the accounts were seized by the department and, therefore, he could not produce any proof about income, this is not a reliable statement because later on such witness has stated in his deposition that they had arrived at compromise with income tax department and all their books were returned. However, petitioner has made an attempt to prove his income tax return for the assessment return of the year 1991 to 2000 i.e. after 8 years of accident. Therefore, the tribunal has considered that it shall have to again involve itself in guesswork and hypothetical

consideration for deciding the income of the petitioner at the time of accident. Therefore, considering the depositions of petitioner and his father that petitioner was partner in steel rolling mill and when it is proved that petitioner was associated with such business yielding Rs. 3 to 4 Crore, the tribunal has presumed that he was in well placed financial position and, therefore, his income can be considered as Rs. 8000/- per month at the time of accident and considered prospective income as RS.12,000/- per month for actual and future loss of income. Therefore, for 30 months of treatment, tribunal has awarded Rs. 2,40,000/- for actual loss of income and considered 40% disability for the whole body and applying 17 as suitable multiplier considering 21 years as age of the petitioner tribunal has awarded Rs. 9,79,200/-.

11.4 So far as proved income of the victim at the relevant time is concerned, the statement of the father of the victim is surprising that because of income tax raid, books of accounts were seized by the income tax department and, therefore, he is unable to prove the income of the injured victim whereas in second breath he admits that he had settlement with the department and, therefore, department has returned the books of accounts. All such statement on oath needs to be condemned because in that case there must be documents of settlement with the department, there must be some evidence of raid and settlement. In any case, in absence of any documents regarding raid and settlement when claimant is keen to call upon the witness from the hospital to prove the expenditure from the same, nobody has restricted the claimant from calling a person from income tax department to confirm that if there was raid and seizure of account books and to produce the relevant and material evidence regarding his income. It goes without saying that when income tax department has raided the business premises of the claimant, it is certainly for non payment of tax or for non disclosure of correct income, wherein income tax department is presuming that claimants are having more income then disclosed by them. In that case, on the contrary, it would be in favour of the claimants to call upon the witness from income tax department and to prove his income which would certainly entitle him to receive more compensation. Therefore, non calling of witness from income tax department would goes against witness so as to presume that claimant wants to hide his correct income and, therefore whatever income is disclosed by the claimant, it cannot be believed as gospel truth. If we verify the record and proceedings, the claimant has claimed in his petition because of injuries he has suffered yearly loss of Rs. 75,000/- and, therefore, he has claimed Rs. 13,50,000/- on such count. While claiming such amount it is pleaded by the claimant that he is unable to work either for partnership firm or for his own firm on account of 100% disability and he is suffering loss of Rs. 75,000/- per annum. Therefore, it is to be presumed that his yearly income at the time of filing of petition his income is Rs. 75,000/- per annum. All such facts are supported by documents produced by the claimant at exhibit 160 with list. Though such documents are produced at belated stage and that it is not properly proved on record and accepted, the tribunal has erred in relying upon

partnership deed at mark 160/12 so also mark 5/4 being statement of the accused but not relying upon mark 160/1 being statement of income of the victim for the year 1991 ? 1992 for the year ending on 31.03.1991 which is relevant for considering the income of the year 18.04.1991. That such statement is an unsigned statement, when petitioner himself has filed such statement on record wherein Rs. 74,570/- is shown as yearly income and thereby when it collaborated the pleadings on day one to disclose the yearly earning capacity Rs. 6,25,000/- per month, the tribunal has squarely erred in considering Rs. 8000/- as monthly earning capacity and Rs. 12,000/- as prospective income for awarding compensation under the head of future loss of income. It is true that claimant has also produced a statement on account of income tax return for the year 1999 wherein his income is shown as Rs. 1,88,077/- and paid income tax on such amount for the year 1998-1999. Thus, it seems year of 1999-2000. Therefore, practically claimant has tried and admitted to prove his income as such for claiming higher compensation.

12. Though such litigation and legal concept and law relating to such claim petitions are liberal in favour of the claimant generally it should be for the illiterate and poor victims, who are unable to prove their income for several reasons, but for appellant who has been to Germany for proper shoes and who spent huge amount on his treatment and whose business premises are allegedly raided by the income tax department either for non-disclosure of proper income or for not paying income tax and, therefore, such victim/appellant would be certainly in a position to prove his income if not beyond reasonable doubt by cogent and reliable evidence then approximately by prima facie evidence, which is produced at list at exhibit 160 being statement of account for the year 1991-92. It is also clear that when such statement was prepared by a private firm practicing on income tax side namely Pandya and Co. may be a Chartered Accountant Firm, then victim can certainly call upon someone from such firm to prove his income. But in any case when he is pleading his yearly earning capacity as Rs. 75,000/- which is supported by statement of income for the year which is produced at mark 160/1, tribunal has certainly erred in considering Rs. 8000/- as monthly earning capacity of the appellant at the time of accident which is higher than what is pleaded by the claimant. Other surprising fact is silence of both victim and his father on actual income on oath before the tribunal. When victim is claiming Rs. 20,00,000/- as compensation disclosing that he is earning Rs. 75,000/- per annum if we peruse his deposition except his difficulty and hospital and treatment and details of amount spent by him, he has not stated a single word about his income. Similar is the situation when father of the victim at exhibit 98 has though stepped into witness box, failed to disclose the income.

13. Therefore, considering the overall evidence on record and discussion it would be appropriate to reduce the total amount of compensation considering 5% negligence of the victim and Rs. 6000/- as earning capacity of the victim at the relevant time and arrive at Rs. 9000/- prospective earning capacity instead of Rs. 12,000/-. Considering the overall record as stated herein above I do not wish to

alter or modify the amount of compensation on different heads except for actual loss of income and future loss of income and reduce it for 5% for negligence of the claimant. Therefore, claimant is entitled to compensation in following manner:

Rs. 2,00,000/-

Pain and suffering and loss of enjoyment of life

Rs. 5,25,982/-

Expenses for medicines, X-rays, reports, blood, artificial limbs and charges of hospitals and limb centers

Rs. 1,61,400/-

Charges for operations, doctors' visit and attendance by nurse

Rs. 70,000/-

Charges for artificial limbs in future

Rs. 1,50,000/-

Transportation

Rs. 1,33,800/-

Expenses for attendants

Rs. 50,000/-

Rich diet

Rs. 1,80,000/-

Actual Loss of income at the rate of Rs. 6000/- per month for 30 months

Rs. 9,18,000/-

Future Loss of income at the rate of Rs. 9000/- per month, 50% disability, using 17 as suitable multiplier

13.1 Therefore, award is to be modified whereby now instead of Rs. 25,10,382/- the claimant is entitled to Rs. 22,70,000/- as total compensation with same rate of interest i.e. 7.5% from the date of incident till realisation with cost.

14. However, pursuant to order dated 11.05.2007, if appellant has paid entire amount of compensation then original claimant shall refund the amount of Rs. 2,40,382/- with interest to the appellant. If amount is invested in FDR as per direction in the award then tribunal shall refund such amount either from the amount invested in FDR or it is the choice of the claimant to refund the amount on his own so as to keep the FDR undisturbed.

15. Though tribunal has committed an error on several issues in favour the claimant, the fact remains that the tribunal has also erred in reducing disability

to 40% instead of considering it as 50% for the simple reason that otherwise also disability of any limb for body as a whole by reducing it 50% and not 40%. Moreover, for amputation the guiding factors are available in the schedule I under the Employees Compensation Act wherein item Nos. 16 to 22 in para II regarding list of injuries deemed to result in permanent partial disability provides for different percentage loss of earning capacity from amputation by the amputation of one foot for all such operations of any one leg. The percentage of loss of earning capacity prescribed under the statute is between 50 to 90%. Therefore, it would be appropriate to consider disability of the claimant as 50% instead of 40%.

16. Thereby, appeal is partly allowed. Award to be drawn accordingly. Record and Proceedings be sent back to the concerned trial Court forthwith.