

(2022) 07 GUJ CK 0016

In the Gujarat High Court

Case No : R/First Appeal No. 3831 Of 2012, 806 Of 2013

Pushpaben Wd/O Dineshchandra Hasmukhlal Thakkar & 4
Other(S)

APPELLANT

Vs

Manchi Babubhai Jagabhai & 2 Other(S)

RESPONDENT

Date of Decision : 08-07-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 107, Order 41 Rule 24
Motor Vehicles Act, 1988 — Section 166, 173

Citation : (2022) 07 GUJ CK 0016

Hon'ble Judges : A.J.Desai, J;Mauna M. Bhatt, J

Bench : Division Bench

Advocate : Hiren M Modi, Dakshesh Mehta

Final Decision : Partly Allowed

Judgement

Mauna M. Bhatt, J

1. These cross appeals under Section 173 of the Motor Vehicles Act, 1988 ('the Act' for short) are filed challenging the judgment and award dated 7.8.2012, passed by the Motor Accident Claims Tribunal (Auxi.), Court No.9, Ahmedabad in M.A.C.P. No.678 of 2005.

2. In First Appeal No. 3831 of 2012 appellants are the original claimants and filed this appeal seeking enhancement of compensation whereas in First Appeal No.806 of 2013 appellant is the Insurance Company (original Opponent No.3), and filed this appeal questioning its liability to pay the compensation.

3. As both these cross appeals are arising out of judgment and award dated 7.8.2012, in M.A.C.P. No.678 of 2005, for the same accident, they are heard and decided together.

4. Following facts emerge from the record of these appeals:

4.1. That Shri Dineshchandra Hasmukhlal Thakkar (herein after referred to as

deceased) was going to his office at Jindal Taxofab on 6.8.2005 by driving a scooter bearing registration No. GJ-1-JJ-7510. When he reached near Nirma underpass closer to Hanumanji Temple, the driver of Tractor bearing registration No. GJ-2-L-7114 came in a rash and negligent manner from the wrong side and dashed with the scooter. On account of this, the deceased fell down, sustained grievous injuries and died on the spot. The FIR was lodged and panchnama was prepared. For the said accident, the original claimants filed Claim Petition under Section 166 of the Act seeking compensation of Rs. 30 lakhs.

4.2. It was the case of the claimants in the Claim Petition that the accident occurred because of sole negligence on part of the driver of the tractor. It was further their case that the deceased was earning Rs.8,000/-p.m. as he was a Manager in Jindal Taxofab Limited and in addition to the salary income, the deceased was doing business and from that also, he was earning substantial income. In support of his income from business, the claimants had placed on record income tax returns for the following Assessment years:-

(i) AY 2003-2004 (Rs.42,111 minus Income tax and other deductions) = Rs.38980/-.

(ii) AY 2004-2005 (Rs.71,510 minus Income tax and other deductions) = Rs.64,496/-.

(iii) AY 2005-2006 (Rs.1,42,558 minus Income tax and other deductions) = Rs.1,10,447/-. (The return for AY 2005-2006 was filed after death of the deceased by the wife).

4.3. It was their case that on account of untimely death of the claimant, they are entitled for the total compensation under different heads as claimed.

5. In First Appeal No.806 of 2013 (arises out of M.A.C.P.678 of 2005), it was case of the Insurance Company that at the time of accident, the driver of tractor was not holding valid and effective license. The driver was holding license to drive light motor vehicle whereas he was driving a tractor with tanker, which is a transport vehicle. Transport vehicle does not come within the definition of 'light motor vehicle' for which the license was issued and therefore, driver was not holding valid and effective license at the time of accident. Therefore insurance company was not liable for the payment of compensation.

6. The Tribunal framed the following issues for consideration:

1. Whether the applicant (s) proves (s) that deceased died due to rashness and negligence on the part of the driver of the Tractor involved?
2. What amount of compensation and from whom claimant is entitled to?
3. What order and award?

7. The Tribunal after hearing the parties and considering the evidence on record decided the issue No.1 i.e. of negligence, by holding the driver of the tractor as

sole negligent for the accident. For Issues Nos. 2 and 3 i.e of compensation, Tribunal awarded total compensation of Rs.6,49,000/- under different heads as under:

Loss of Dependency

Rs.6,24,000

Loss of Consortium

Rs.20,000/-

Funeral Expenses

Rs.5,000/-

Total

Rs. 6,49,000/-

8. The Tribunal held Insurance Company and owner of the vehicle as jointly and severely liable for the payment of Rs.6,49,000/- with 9% interest from the date of Claim Petition till its realization.

9. Aggrieved by the judgment and award dated 7.8.2012, captioned appeals are filed by original claimants as also by the insurance company.

10. We have heard learned advocate Mr. Hiren Modi for the original claimants and learned advocate Mr. Dakshesh Mehta for the Insurance Company. As both appeals are arising out of the same judgment and award, with the consent of the learned advocates for the respective parties, they are taken for final disposal. Though served, none appeared for respondent Nos. 1 and 2.

11. Appearing for the Insurance Company, learned advocate Mr. Mehta submitted that the Tribunal is in error in fastening the liability on Insurance Company for the payment of compensation. Relying upon the application at Exh.65, he submitted that pursuant to the application of the insurance Company dated 6.4.2012, an additional issue being issue No.1-A was framed by the Tribunal. However, the same was not answered in the final judgment and award and, therefore, the judgment and award dated 7.8.2012 is erroneous. He therefore, submitted to remand the appeal. In relation to merits of the driving license, referring to FIR at Exhibit -42, he submitted that the tanker was attached with tractor and therefore vehicle driven by driver cannot be stated to be a Light Motor Vehicle or a Non-Transport Vehicle as held by the Tribunal. Referring to license at Exh.66, he submitted that admittedly driver was holding license to drive a Light Motor Vehicle and, therefore, the judgment and award of the Tribunal is erroneous.

12. On the other hand, learned advocate Mr. Hiren Modi appearing for the original claimants submitted that the award passed by the Tribunal is based on proper appreciation of evidence on record. Referring to the award, he submitted

that the Tribunal took cognizance of the submission of the Insurance Company and thereafter held the insurance company liable. The Tribunal had recorded that it was not borne out from the record that the tanker was attached with the tractor and the tractor alone being a non-transport vehicle, the driver was holding valid and effective license, thus the issue of driver holding valid and effective license was considered by the tribunal before fastening liability. He submitted that there being no error in the judgment and award of the Tribunal, the appeal of the Insurance Company being meritless be rejected.

13. In relation to compensation awarded by the Tribunal, he submitted that the deceased was having salary income as well as income from business. The Tribunal is in error in not considering the income of the deceased from business. In support of this submission, he relied upon the income tax returns filed for Assessment years 2003 -04. AY 2004-05 and AY2005-06. He further submitted that the Tribunal fell in error even while considering the salary income, since the same was not appropriate and lesser than what was produced on record. He therefore, submitted to enhance the compensation accordingly.

14. No other and further submissions have been advanced by the Learned Advocates for the respective parties.

Findings of First Appeal No. 806 of 2013

15. We have considered the rival submissions as also the evidence on record. Upon re-appreciation of evidence on record, we have noticed that pursuant to the application (Exhibit -65) filed by the Insurance Company for framing an additional issue, an order dated 6.4.2012 was passed by framing issue 1-A as under:

"(1-A) whether opponent no.3 National Insurance Co. Ltd. proves that the driver opponent no.1 was not authorized to drive a transport vehicle No.GJ-2L-7114 which was being used as a transport vehicle at the material time of the alleged accident? If yes, what effect?"

16. The said issue, though having been framed and discussed at length in the impugned judgment and award, we are of the considered opinion that the Tribunal fell in error in not adducing any finding qua the same.

17. Order 41 Rule 24 of CPC reads as under:

"24. Where evidence on record sufficient, Appellate Court may determine case finally.-

Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds."

17.1. Reading of Order 41 Rule 24, in our opinion permits this Court to answer

issue which has been framed by the Tribunal. Further in the decision of the Hon'ble Supreme Court in the case of Zarif Ahmad (Dead) Through Legal Representatives and Anr. vs. Mohd. Farooq reported in (2015) 13 SCC 673, the Court has held as under:

"13. No doubt, Section 107 CPC empowers the appellate court to remand a case, but it simultaneously empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule 24 Order 41 CPC provides that where evidence on record is sufficient, the appellate court may determine the case finally. It is not a healthy practice to remand a case to the trial court unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, should a case be remanded e.g. when the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues, but it is not so in the present case."

18. Drawing inference from the aforesaid Judgment, we deem it appropriate not to remand the matter but take it upon ourselves to deliberate upon and decide the additional issue 1-A framed by the Tribunal as under:

19. Upon re-appreciation of evidence particularly panchnama, we have noticed that the driver was driving the tractor which dashed with scooter. Panchnama also records that the dash was so heavy that it created wheel marks of tractor till 7 feet.

The length and width of road was also recorded in panchnama. However, panchnama nowhere records presence of tanker attached with the tractor as claimed by Insurance Company. Moreover, in the affidavit of eye witness Shri Yogeshbhai Manharbhai Shah at Exhibit-53, it is stated that the tractor was driven in a rash and negligent manner which dashed with the scooter. Affidavit does not refer to tanker attached to tractor. Even in cross examination by the appellant-Insurance Company, no question of tanker attached with tractor came on record. Thus from record it does not transpire that the tanker was attached with the tractor. Further, the Tribunal in the judgment and award dated 7.8.2012 has also categorically held that the tractor was driven by the driver in a rash and negligent manner and no trolley or tanker was attached to the same for carrying any goods. Moreover, perusal of the record reveals that the driver was holding license for light motor vehicle. As only the tractor was driven by the driver and no trolley or tanker was attached to the same, the contention of the appellant-Insurance Company that the vehicle will come under the definition of transport vehicle in our opinion is not acceptable. In our opinion, the Tribunal has rightly observed that as no trolley or tanker was attached to the tractor, the vehicle driven by the driver will not come under the definition of transport vehicle. Admittedly, the driver was holding license for non-transport vehicle, which he was driving at the relevant time, and therefore the Insurance Company is in our considered opinion jointly and severely liable for the payment of compensation as awarded by the Tribunal.

20. In view of the above, the issue framed as 1-A is answered by holding that the National Insurance Company failed in proving that the driver (opponent No.1) was not authorized to drive vehicle bearing registration NO. GJ-2-L-7114 which was being used as a transport vehicle at the material time of the alleged accident.

21. In view of the afore-going reasons, the appeal filed by the Insurance Company fails and is hereby dismissed with no order as to costs.

Findings of First Appeal No. 3831 of 2012

22. Upon re-appreciation of evidence on record, we have noticed that the deceased was serving as Manager in Jindal Taxofab Ltd. The salary slip at Exh.59 of Jindal Taxofab is on record which supports that he was earning the salary of Rs.8,000/-p.m. Moreover, for the income earned from business, the income tax returns filed show income of the deceased as under:-

(i) AY 2003-2004 net income of Rs.38,980/-

(ii) AY 2004-2005 net income of Rs.64,496/-

(iii) AY 2005-2006 net income of Rs.1,10,447/-

23. Thus, income tax returns filed by the deceased prior to his death, show income from business, therefore, in our opinion the same cannot be ignored. However, we are also mindful of the fact that the return for AY 2005-2006 was filed by wife of the deceased, subsequent to the accident and shows steep rise in the income earned from business. We are also of the opinion that no misuse can be permitted of this benevolent legislation and therefore, in absence of any straight jacket formula to arrive at just compensation, we deem it appropriate to take average of two preceding years i.e. AY 2003-2004 and AY 2004-2005 to calculate the income of the deceased from business. Therefore, the income of the deceased from business can be assessed as under:

"Rs.38,980 for AY 2003-2004 + Rs.64,496/- for AY 2004-2005

= Rs.1,03,476/- divided by 2 = Rs.51,738/- as income from business p.a."

24. The deceased was having salary of Rs.8000/- p.m. (Rs.8,000x 12 (p.a.) = Rs. 96,000/- p.a. (income from salary). The total income of deceased would be Rs.96,000+Rs.51,000 (round off) = Rs.1,47,000/- p.a.

25. As the deceased was survived by 06 dependents, deduction of ¼ towards personal expenses would be appropriate. As the deceased was 46 years old as per decision of National Insurance Co. Ltd. vs. Pranay Sethi and Ors. reported in (2017) 16 SCC 680 30% would be applicable to arrive at prospective income. Thus the future loss of income would be as under:

"Rs.1,47,000 + Rs. 44100 (30% prospective income) = Rs. 1,91,100/- - Rs.47,775/- (1/4th towards personal expenses) = Rs.1,43,325/- x 13 (multiplier as the age of the deceased was 46 years)"= Rs. 18,63,225/-".

26. Further, in view of the decision of Magma General Insurance Company Limited vs. Nanu Ram Alias Chuhru Ram and Ors. (2018) 18 SCC 130 and Satinder Kaur alias Satwinder Kaur v. United India Insurance Co. Ltd. [AIR 2020 SC 3076] the deceased would be entitled for Rs.80,000/- towards consortium. For loss of estate Rs.30,000/- and funeral expenses Rs.15,000/-, in our opinion would be appropriate.

Future loss of income

Rs.18,63,225/-

Parental consortium & Loss of consortium

Rs.80,000/-

Loss of Estate

Rs.15,000/-

Funeral Expenses

Rs.15,000/-

Total

Rs.19,73,225/-

27. Thus, the appellants - claimants would be entitled to total compensation of Rs.19,73,225/-. As the Tribunal has awarded an amount of Rs.6,49,000/-, the respondent Insurance Company shall deposit the balance additional amount of compensation of Rs.13,24,225/- (Rs.19,73,225 – Rs.6,49,000) with 6% interest p.a. and proportionate costs from the date of filing of the claim petition till its realization with the Tribunal within a period of 8 weeks from the receipt of the order. If the aforesaid amount is not deposited as directed herein above, appellants would be entitled for interest at the rate of 9% from the date of filing of the petition till its realization. Appeal is thus partly allowed. The rest of the judgment and award passed by the learned Tribunal has remained unaltered. Registry is directed to transmit back the Record and Proceedings of the case to the concerned Tribunal forthwith. However, there shall be no order as to costs.