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(1976) 12 GUJ CK 0013

In the Gujarat High Court

Case No : First Appeals No''s. 608 and 683 of 1976

Shakurmiya Imammiya Shaikh and Others — APPELLANT

Vs

Minor Surendra Singh Rup Singh and Others — RESPONDENT

Date of Decision : 23-12-1976

Acts Referred:
Constitution of India, 1950 — Article 133(1)

Citation : (1978) ACJ 130

Hon'ble Judges : J.B. Mehta, J;A.M. Ahmadi, J

Bench : Division Bench

Advocate : S.B. Vakil and M.H. Kadri, for the Appellant; R.N. Oza and D.U. Shah, for the Respondent

Judgement

J.B. Mehta, J.—The original opponents Nos. 1, 2 and 3 and the claimants have filed respectively these two appeals against the award of the Claims Tribunal awarding compensation of Rs. 34,500/- with proportionate costs and interest from the date of the application till payment at 6%. The concerned widow has also now expired on February 3, 1976 and therefore, only four minor claimants are now represented by the grand-father. The deceased Rajusing Dipsing was a police constable at Shamlaji on the night of May 5, 1973. He had been sent at mid-night to Ahmedabad to deliver an urgent message of the Sub-Inspector at Shamlaji Police Station to Ahmedabad and that is why this unfortunate constable was carried as a pillion rider on the motor-cycle in question driven by opponent No. 6 Balkrishna Joshi. On this fatal night the motor cycle was proceeding from Shamlaji to Ahmedabad along the north-south road and the accident took place after a distance of one kilometer from Chandrala village on this road. This tar road is admittedly 21''-9" wide with Kutcha shoulders on both the sides of 6''-6". The truck came from the opposite side with full dazzling light and therefore, the motor cycle could not go on his right-hand side and it collided with another truck lying at the spot No. GTS 1283 belonging to opponent No. 2, which was driven by opponent No. 1 and which had been insured by opponent No. 3 the insurance company. The truck was parked on the tar road and it had been left there by

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opponent No. 1 driver without any back light or reflector or without any head light at the rear and without leaving any signal to indicate the presence of this parked truck. In fact, the driver opponent No. 1 was sleeping in the truck. 1 he motor cycle collided against the rear part of this parked truck and therefore, both opponent No. 6 and this constable had been thrown on the road. As a result of this collision, the constable had been seriously injured and was removed to the hospital where he died on the same day. The truck driver opponent No. 1 of this parked truck ran away with the truck after this accident and he has not filed any written statement or given evidence in the witness box. Compensation was claimed before the Tribunal to the extent of Rs. 60,000/- but the Tribunal on the basis of Rs. 175/- as the datum figure awarded compensation claim only to the extent of Rs. 34,500/-. The Claims Tribunal also held that there was no necessity to apportion the compensation amount because the tortfeasors would be jointly and severally liable to the dependents of the victim. Therefore, it was not necessary to determine the proportion of negligence, but if it was necessary to do so, he would consider opponent No. 6 as liable to the extent of 25%. The victim could, however, recover from both the tortfeasors, Opponent No. 6 has not filed any appeal. Opponents Nos. 1 to 3 have filed an appeal and the claimants have filed cross appeals to the extent of the claim disallowed i.e. to the extent of Rs. 25,400/-.

2. At the hearing by an affidavit the claimants have clarified the position as to the effect of implementation of the Second Pay Commission Report with back effect from 1.1.73 as per the revised pay rules and with effect from May 1, 1973, so far as dearness allowance is concerned. The award had been given in January 1976 and at the stage of evidence when police constable Jaswantsing Khumansing, Ex. 130, was examined on December 23, 1975, his deposition related to pay, dearness allowance etc. on the basis of interim relief. As now the final revision has come into effect, this clarificatory affidavit had been taken on record. It is true, Mr. Kadri had vehemently argued, that this affidavit could not now be taken on record. Mr. Kadri ignores the fact that this is an affidavit only clarifying the position as to the implementation of the revised pay scales which as, per the subsequent notifications have come into effect. The two notifications of the Government are of October 1975 and January 5, 1976 and therefore, judicial notice could be taken of this revision of emoluments of Government servants with such back effect from 1.1.73 and 1.5.73 because the accident in the present case has taken place on the night of May 5, 1973, at about, 3.00 a.m. A Ready Reckoner of Dearness Allowance and Additional Dearness Allowance effective from 1.5.73 has been annexed for computation of dearness allowance by way of immediate reference to figures which could be equally worked out even on the basis of the revision of pay scales and the D.A. as per the said Government notifications. Therefore, no objection can be taken to the affidavit being taken on record and the said objection has been overruled.

3. At the hearing Mr. Vakil and Mr. Kadri for opponents have challenged the award on various grounds. As regards negligence, the Claims Tribunal rightly

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found the negligence clearly established in the present case. The evidence of opponent No. 6 at Ex. 119, the motor cyclist was completely corroborated by completely independent witness Somabhai Patel, Ex. 95 and by the eloquent facts which emerged from the relevant Panchnama, Ex. 57. The collision had taken place at about 3-0 a.m. It was a dark cloudy night. The motor cyclist had categorically stated that he could notice this parked truck only when he came very near to it to a distance of about 10 ft., but before that he had been dazzled by the full light of another on-coming truck from the opposite side. There was no person present and no stone or signal to indicate the presence of the parked vehicle and so this collision had taken place between the left front portion of the motor cycle and the the right rear portion of the parked truck. There was no glass reflector at the rear. At the parked truck there were no rear reflectors or rear light. He categorically denied that the parked vehicle was wholly on the Kutcha road, but according to him all the four wheels of the vehicle were on the tar road. He was on the correct side at only 5'' from the edge of the tar road on the left. The independent witness Somabhai, Ex. 92, who was the Sanchalak of Chandrala Milk Co-operative Society, had been standing on this National Highway Road No. 8 on this fatal night at about 3-00 a.m. at only 50 to 60 ft. from the parked truck. He completely corroborates the version of the motor cyclist that the other truck had come from the opposite side and the motor cyclist dashed against the rear part of the parked truck as a result of which both these persons had fallen down from the motor cycle. The driver and the conductor of the parked truck had been sleeping in the truck. He also categorically deposed that there was no light at the rear of the truck or any red flag or signal or even a stone indicating the presence of the parked truck. The motor cyclist was on his correct side. He denied that the motor cyclist collided with the front part of the truck. It is true, he had stated that his attention was drawn after the sound of collision was heard and he had felt on seeing the back of the parked truck that the motor cyclist had collided with the right rear back portion almost at the end but he felt that the governor of the motor cycle had collided with the truck. This man had been the Panch for the Panchnama Ex. 57 of the scene of the accident which was drawn on May 6, 1974, at 4-0 to 5-0 p m. The Panchnama mentions that the place of the accident where blood was lying and the oil trail with pieces of glass was to be found at this place 6''-8" from the western edge of the tar road and 15''-1" from the eastern edge. Therefore, the Claims Tribunal had observed that the place of collision was within the western half of the road which clearly shows that the parked truck was wholly on the tar road. It appears that the motor cyclist having been dazzled had collided with this parked truck. Therefore, from the primary facts of leaving the parked truck wholly on the tar road on such dark cloudy night without any rear light or reflector or signal to show presence of this parked truck and when the driver, opponent No. 1 and the conductor had been sleeping in the truck, negligence of the parked truck clearly emerges. Neither the driver nor the conductor has come in the witness box to rebut the presumption of negligence which arises from these primary facts.

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4. Mr. Vakil, however, vehemetly argued that the witness Somabhai Patel, Ex. 95, appeared to be a chance witness and he had not seen the incident because his attention was drawn only by the sound of the collision. The evidence of the motor cyclist is corroborated by this independent witness which supports his testimony and by the facts emerging from the Panchnama of the scene of the accident at Ex. 57. The version sought to be put up that the collision had taken place from the front is falsified by the aforesaid evidence. Mr. Vakil vehemently argued that the Panchnama of the parked truck Ex. 58, does not disclose any damage on the rear. The Claims Tribunal has duly considered this circumstance that this Panchnama, Ex. 58, was made on May 7, 1973 after 36 hours.

In fact the truck had left the place because opponent No. 1 had escaped with the truck after the accident. When merely the governor or a small portion of the motor cycle had dashed with the rear part of the truck hardly any damage mark can be left on the truck. Therefore, this clear evidence could not be discarded. There is hardly any dispute where the accident took place and whether the collision was in the front portion or the rear, it was due to the negligence of the parked truck. Mr. Vakil argued that in any event the motor cyclist must be grossly negligent. It is true that no appeal had been filed by this motor cyclist, opponent No. 6, because the observation of the Claim Tribunal as to the apportionment was in the alternative. In fact much could have been said for opponent No. 6 because opponent No. 6 has categorically deposed that first he saw the on-coming truck from a distance of 200 ft. and he had been completely dazzled by the full light. He became aware of the presence of the parked truck only from a distance of 10 ft. Therefore, in this sudden emergency when he was so blinded, if he collided with this parked truck, his negligence would be very insignificant as compared to the negligence of this parked truck driver who left the truck on the main tar road in such a condition on such a dark cloudy night without even light in the rear or reflector and without putting any signal to indicate presence of this parked truck. Therefore, the grievance, if any, can be of opponent No. 6. But that question does not arise before us as we have to determine liability of these tortfeasors qua the claimants. The negligence was, therefore, completely established and that finding of the Tribunal could never be interfered within this appeal.

5. Mr. Vakil next argued that there should be a separate award against the tortfeasors. In the decision in Life Insurance Corporation of India and Another Vs. Kasturben Naranbhai Vadhia and Others, , the entire legal position has been well settled by this Court. So far as the victim is concerned, the liability is joint and several. Therefore, even if apportionment may be sought by the tortfeasors by leading relevant evidence on the basis of the blameworthiness, so far as the claimants are concerned, the award has got to be joint award where the liability of both the tortfeasors would be joint and several to meet the claimant''s claim. Therefore, there is no substance in the contention of Mr. Vakil.

6. The next contention of Mr. Vakil is that the widow having now expired, while

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assessing compensation, the multiplier must be reduced. We are assessing compensation as per the settled legal position in various decisions of this Court as per the simpler Davies method where this 15 years multiplier which is adopted for such breadwinner at this relevant age would take into account all chances and changes which are likely or probable and more often than not. Even if the widow had expired, the compensation amount of the minors would stand augmented. But that would not be the reason for changing the multiplier for capitalising dependency benefit while adopting Davies method.

7. Coming to the question of assessment of compensation, the deceased constable was aged 34 only and he had a family of his wife and four minor children. The emoluments of the police constable as per the evidence of constable Jasvantsing, Ex. 130, on the basis of interim relief at the date of the accident were Rs. 130/- pay per month, Rs. 157/- D.A. and Rs. 30/- was benefit of the free house and local allowance at Rs. 12.40 p. as seen from the service book, Ex. 106. He had benefit of free medical aid. Therefore, as per the figures then prevailing for the interim relief, the total emoluments would come to Rs. 329.40 p. The same figures, now after the revision of pay and D.A. with back effect, would have to be worked out on the basis of Rs. 245/- as pay. In the affidavit the emoluments have been worked out along with the D.A. and increments in 1974 and they are in the range of about Rs. 360/- and if the rent free quarter benefit of Rs. 30/- and the local allowance which was raised from Rs. 12.40 to Rs. 16.20 p. would be taken into account, the emoluments as revised would come to the extent of Rs. 420/-. There is also the evidence of the Police Inspector Naharsing Ex. 96, to the effect that an average constable would go upto head constable, Jamadar and P.S.I. Therefore, the case of the deceased, who was the breadearner of the family with prospective career in the police service who has been killed in this accident at the age of only 34, would justify the usual multiplier of 15 being adopted for capitalising the dependency benefit in any event. Looking to the emoluments of the deceased which were Rs. 3,00/- to 400/- as aforesaid, it is obvious that the dependency benefit could easily be capitalised on the datum figure of at least Rs. 275/- per month as going to the family members. Therefore, the assessment of the Claims Tribunal on the basis of only Rs. 175/- was completely on an erroneous basis. For computation of compensation in this case taking the multiplicant as the monthly amount of Rs. 275/- or Rs. 3300/-annually, on capitalising by 15 years purchase, the total amount would come to Rs. 49,500/- and if the conventional amount of Rs. 3,000/- is added, the total compensation would work out at Rs. 52,500/-. That amount would be on a conservative estimate looking to the prospects of the deceased in such police service and looking to his young age of only 34.

8. Mr. Vakil and Mr. Kadri, however, vehemently argued that this revised pay could not be taken into consideration. When the revision of pay has come into force from a back date from 1.1.73 and 1.5.73, even before the date of the accident, these revised emoluments must be taken into account. Both Mr. Vakil and Mr. Kadri finally argued that the deceased widow had admitted that Rs.

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100/- was her pension amount and so deduction of this pension amount was claimed. This contention of deduction of pension going to the benefit of the tortfeasors is most startling. In the present case we arc surprised to know that the family has not yet got compensation amount on the ground that the service book had not been produced. If that was the difficulty the service book should be immediately allowed to be taken back by the claimants on production of the relevant extract. In fact, the deceased had died in harness because he was carrying the message to the Ahmedabad Police Station and for that purpose the P.S.I. Shamalaji had arranged for the conveyance of this deceased on the pillion seat of this motor cycle of opponent No. 6 as is clear from his evidence. We are sure that the Government, if it was properly moved by the proper representation disclosing all these facts, would surely consider the claim of such a person who had died in harness for a proper compensation from the employer side. In any event, so far as this matter is concerned, any amount which comes by way of such sympathetic compensation from the State or pension amount which the dependents got as a result of the death of the employee after putting in qualifying service for earning that pension could never go to the benefit of the tortfeasors as per the settled legal position in the aforesaid Life Insurance Corporation of India and Another Vs. Kasturben Naranbhai Vadhia and Others, case. There we have referred to the settled position in the earlier decisions of this Court in First Appeals Nos. 159, 160 of 1968 decided on November 3, 1971, where the settled legal position in the latest decision by the House of Lords in Perry v. Cleaver 1969 A.C.J. 363 had been followed. It was pointed out that it was accepted as a settled principle of common law, which was followed not only in England but in all other common law jurisdictions after Bradburn''s case (1874) All E.R. Rep. 195, that insurance policy amounts were collateral benefits which the deceased had bought with his own money. It was a benefit derived by way of prudent savings effected for his own benefit under a contract by the insured party whose benefit could never go to the tortfeasors. In Parry''s case 1969 A.C.J. 363 their Lordships pointed out that the common law has treated this matter as one depending on justice, reasonableness and public policy. In the speech of Lord Reid, the reasons were indicated as to why proceeds of insurance and sums coming by reason of benevolence were always excluded. Benevolent payments if they went to the benefit of the tortfeasor would have dried up the springs of private charity. Even in respect of public benevolence in the shape of various unconvenanted benefits from the Welfare State, it had been observed that they were never intended to go to the benefit of the wrongdoer. So far as the insurance moneys were concerned, it was observed at page 558 by Lord Reid that the real and substantial reason for disregarding them was that the Plaintiff had bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefits from it should ensure to the benefit of the tortfeasor. That is why Lord Reid in terms observed that there could hardly be any difference if the employee insures to get such pension amount by arrangement with his employer rather than with an insurance company. Lord Reid, therefore, observed at page 558 that it would be wholly

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unreasonable conclusion to exclude the pension amount which stood on the same basis as the insurance moneys. When the matter was tested on principle. Lord Reid, at page 560, gave a correct test why pension amount was excluded because of its intrinsic character as being totally different in nature from wages, even when it was a contributory disablement pension. Wages were awarded for contemporaneous work but pension was a fruit through insurance of all the money which were set aside in the past in respect of his past work and they are totally different in kind. The insurance element was only in the resemblance that as in every other kind of insurance what pension was obtained depended on how things turned out. Such retirement or disablement pensions were essentially in the nature of insurance benefits and therefore, if as per the settled legal position every where insurance benefits were deductible in assessing damages, the pension would always be deductible. It was also pointed out that it was only the like which can be deducted from the like and if the intrinsic nature of pension was kept in mind it could never be deducted from the damages. Lord Pearce and Lord Wilberforce had also pointed out how such service pension especially such police men''s pensions were not by way of a substitute of capacity to earn even though they were in the nature of disability pensions. In the present case we are not taking into account any augmentation of the salary for working out the figure of multiplicand or datum figure by treating the pensionary benefit as being reflected in the loss of earning capacity and therefore, it having never entered in the computation of the assessment of damages in the method adopted by us, it would be preposterous to say that this amount should be deducted from the damages. It is only if it was taken into account while arriving at the figure of multiplicand that a question may be raised that such overlapping should be avoided. Besides the question was completely of a collateral benefit which the deceased got by an independent contract with his employer, in addition to his wages, by putting in the qualifying service. That is why in Daish v. Woutan (1972) 1 All E.R. 25, the Court of Appeal in terms applied, after Perry''s decision, the test of intrinsic nature of the benefit in the light of justice and public policy for considering the question of such equitable deduction. It was in terms held that such payments which had come as a result of legislation or a contract or private or public benevolence and which came independently of any right of redress against such tortfeasor, so that these salutary benefits conferred on the victim were enjoyed by the victim or the members of his family, could never be deducted from the damages, looking to the intrinsic nature of these benefits, which on equitable consideration could never go for the benefit of the tortfeasors. Mr. Vakil, however, vehemently relied on the English decisions which were referred to in Perry''s case and on the fact that the Parliament had changed the position prevailing in the Fatal Accidents Act by the 1959 Amendment by providing for such deduction. All these English decisions and the position of the amendment in England had been considered in Parry''s case and their Lordships had rested the decision on more fundamental principles of high public policy which was only given effect to by the 1959 amendment of the Fatal Accidents Act in England. Therefore, on this ground Mr. Vakil could never have this question

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reopened before this Court. Finally Mr. Vakil referred to the decision in Smt. Sushila Devi and Others Vs. Ibrahim and Another, , where the aforesaid decision of this Court was dissented from and it was held that, while computing damages u/s 110B, sums payable on death under any contract of social assurance or insurance were to be disregarded, but the reasonable prospect of receiving benefits such as compulsory employers'' insurance, whether contributory or non-contributory, gratuity and pension had to be taken into account. The reasons aforesaid which have been given by us, with great respect, have been overlooked while distinguishing the judgment of this Court. We have already dealt with the question of the amendment of the Fatal Accidents Act, 1959, in England which only recognised the public policy underlying such just exclusions. Also no distinction can be made on the ground that Bradburn and Perry''s cases were of non-fatal accidents involving some different consideration, because those cases have proceeded, as earlier pointed out, on the only relevant considerations which can guide such matter of justice, reasonableness and public policy, especially when a "just compensation" is the statutory yardstick laid down by the Parliament under our law. Even acceleration aspect was dealt with by us as it got squared up when in such cases we took as per the Davies method only the 15 years'' multiplier and ignored future prospects. In that view of the matter the aforesaid pension amount of Rs. 100/- which was sanctioned for the widow or the family could never be taken into account for slicing down the aforesaid award of damages.

9. In the result, the tortfeasors ''appeal No. 608/76 must fail and is dismissed, while the claimants'' appeal No. 883/76 must be allowed by awarding the increased amount of compensation of Rs. 18,000/-by making the total award of Rs. 52,500/- instead of Rs. 34,500/- as made by the Claims Tribunal. The whole estimate of Rs. 60,000/- was a reasonable estimate and was not an exaggerated estimate, in any event and therefore, as per the settled decisions the Claimants must get full costs in both the forums. In view of the widow''s death, all the four minors shall now be equally entitled to the entire awarded amount in equal proportion on their attaining the age of 21. In view of our orders, the said amount is at present with the insurance company except the amount of Rs. 5,000/- which was deposited before the claims Tribunal. The Insurance Company shall, therefore, within a period of one month from to-day deposit the balance amount of the award with 6% interest from the date of the application till realisation before the Claims Tribunal. That amount shall be invested in long term fixed deposit in any Scheduled bank for the benefit of these minors--Claimants through the Nazir of the Claims Tribunal. Liberty is reserved to the grand-father to withdraw the amount of Rs. 300/- per month from the interest amount and the balance shall be put in the Saving Bank account where the amount exceeding Rs. 1,000/- shall be transferred to long term fixed deposit. Out of the amount of Rs. 5,000/- which was allowed to be withdrawn for payment of the costs, Mr. Oza has stated that the balance is about Rs. 2,600/-, which shall be retained by the grandfather for the payment of other cost. The Claims Tribunal shall out of the

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amount deposited before it also permit withdrawal to the grandfather amount of Rs. 3000/- to meet the expenses.

10. Mr. Kadri asks for a certificate for appeal to the Supreme Court. On the question of deduction of such pension amount in view of the aforesaid conflict of decision, we would consider that question as a substantial question of law of a general importance fit for certificate for appeal to the Supreme Court. Certificate shall accordingly issue only on that question under Article 133(1) of the Constitution of India. We find no other question fit for a certificate in the appeals. The Claimants'' appeal is accordingly partly allowed with costs. In view of the aforesaid order, no order is necessary on the C.A.

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