

(2010) 07 GUJ CK 0071
In the Gujarat High Court
Case No : First Appeal No. 1593 of 1990

Shardaben and Others

APPELLANT

Vs

Parsottambhai P. Patel and Another

RESPONDENT

Date of Decision : 21-07-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 173

Citation : (2010) 3 GLH 344 : (2011) 52 GLR 330

Hon'ble Judges : Ravi R. Tripathi, J

Bench : Single Bench

Advocate : B.M. Mangukiya, Nos. 1 to 6, for the Appellant; Rajni H. Mehta and B.R. Shah for Defendant No. 2, for the Respondent

Judgement

Ravi R. Tripathi, J.—Shardaben, widow of Dhirajbhai Rayjibhai Patel along with minor Maheshbhai D. Patel and the father, mother and brother of the deceased are before this Court. They are the original-claimants in M.A.C.P. No. 452 of 1986.

1.1. The Motor Accident Claims Tribunal (Main), Bharuch District at Bharuch by judgment and award dated 24-1-1989 awarded an amount of Rs. 75,000/- together with interest @ 12% per annum from the date of petition till the date of realisation and proportionate cost of the petition from both the opponents jointly and severally. The Tribunal was pleased to pass the following order:

(1) The applicant Nos. 1, 2 and 4 do recover Rs. 75,000/- (Rupees Seventy-Five Thousand only) together with interest at 12 percent per annum from the date of the petition till the date of realisation and proportionate costs of the petition from both the opponents jointly and severally.

(2) The petition stands dismissed for the rest of the amount also so far as applicant Nos. 3, 5 and 6 are concerned with no order as to costs.

(3) The opponents do deposit the entire amount with this Tribunal.

(4) On opponents depositing the entire amount with this Tribunal and on

applicant Nos. 1, 2 and 4 paying the deficit Court-fee stamp, if any, on the claim petition (if not exempted from payment of Court-fee) out of the entire amount deposited with this Tribunal by the opponents, Rs. 30,000/- are ordered to be invested in the fixed deposit account in any Nationalized Bank in the name of minor applicant No. 2-Maheshbhai together with the name of his mother the applicant No. 1 as his guardian initially for a period of 61 months, and thereafter, the said deposit receipt shall be renewed on expiry of every 61 months till minor applicant No. 2-Maheshbhai reaches the age of majority. On minor applicant No. 2-Maheshbhai reaching majority, the said amount in fixed deposit with interest if any then due shall be divided equally and each part thereof shall be paid to applicant No. 1 and applicant No. 2 respectively. Till then, the periodical interest that will become due and payable on the said deposit shall be received by the applicant No. 1 and the said amount of interest will be utilized by her of the welfare and upkeep of minor applicant No. 2-Maheshbhai. Applicant No. 4-Gangaben the minor of the deceased Dhirajbhai will be paid Rs. 20,000/- by an account payee cheque and remaining amount of Rs. 25,000/- together with costs and interest will be paid to the applicant No. 1-Shardaben by an account payee cheque for her maintenance and to enable her to defray legal expenses and other expenses.

(5) The opponents do bear their own costs of the petition.

1.2 The facts giving rise to the present First Appeal are set out in Paragraph No. 2 of the common judgment and award in M.A.C.P. No. 737 of 1986 and M.A.C.P. No. 452 of 1986. Paragraph No. 6 of which reads as under:

6. Briefly stated, the facts leading to M.A.C.P. No. 452 of 1986 are as under:

It is the case of the Petitioners that deceased Dhirajbhai was a driver and was in the employment of opponent No. 1. Deceased Dhirajbhai used to drive dumper Truck No. GRV 6054 and on the day of the incident, he was proceeding to Kevadia Colony and the dumper truck was loaded with stones. The road is from east to west and the deceased Dhirajbhai was proceeding from east to west. The deceased Dhirajbhai was driving his dumper with due care and caution just at a moderate speed. When the said truck was about to reach Kevadia Colony, it collided with empty motor truck No. GTS 6217 which was also owned by the opponent No. 1 and the driver Kiransinh of the said came from the opposite driving his truck rashly and negligently and left the correct side of the road and rushed on the wrong side of the road and his truck collided with motor Truck No. GRV 6054 which was driven by Dhirajbhai with the result that the front portion of the said Truck No. GRV 6054 was heavily damaged and deceased Dhirajbhai sustained serious and fatal injuries, and therefore, the legal representatives have claimed compensation of Rs. 2,20,800/-.

1.3 The present First Appeal is filed for an amount of Rs. 1,45,800/- as mentioned in the cause-title, wherein the appeal is valued at Rs. 2,20,800/- for jurisdiction; whereas it is valued at Rs. 1,45,800/- for Court-Fees.

2. Learned Advocate for the Appellant vehemently submitted that the Tribunal has committed an error in apportioning negligence between the drivers of the two dumpers in equal proportion. Learned Advocate for the Appellant vehemently submitted that the dumper driven by the deceased-husband of the Appellant No. 1 was going upward-towards Kevadia Colony. Whereas the other dumber driven by deceased-Kiransinh was coming from Kevadia Colony to dam site. It was "midnight", as mentioned in the claim petition where the accident took place. As is expected, the case pleaded in M.A.C.P. No. 737 of 1986 is that, "the driver of dumper Truck No. GTS 6217 was driving the truck at a moderate speed and in a careful manner and was going from Kevadia Colony to dam site, at that time, opposite dumper truck bearing Registration No. GRV 6054 driven by Dhirajbhai Rayjibhai Patel in a rash and negligent manner came from the opposite direction. At that time and place of the accident, the right front side tyre of that dumper truck burst, as a result of which, the dumper was automatically dragged to its driver side and both the vehicles collided with each other.

2.1. Similarly, the case in M.A.C.P. No. 452 of 1986 (from which the present First Appeal has arisen) the case is, "the deceased Dhirajbhai was driving the dumper truck bearing Registration No. GTS 6054 and was proceeding to Kevadia Colony and his vehicle was loaded with stones; that he was driving his dumper with due care and caution at a moderate speed; that when the said dumper truck was about to reach to Keavdia Colony, it collided with Truck No. GRV 6217 which was driven by one Kiransinh the driver of that dumper truck, who was driving his dumper truck rashly and negligently and leaving the correct side of the road came to the wrong side and collided with dumper Truck No. GTS 6054 driven by deceased-Dhirajbhai. As a result thereof, front portion of the truck No. GTS 6054 was heavily damaged.

3. It is not in dispute that it is a case of head-on-collision. That being so, the normal rule about the apportionment of negligence is "fifty-fifty" unless there are specific reasons for not following that rule. In the present case, the Tribunal has held that rule applicable, which seems to be just and proper to this Court more so in light of the fact that both the drivers have died in the incident.

3.1. Learned Advocate for the Appellant vehemently submitted that it was the driver of dumper bearing Registration No. GTS 6217 whose right side front wheel had burst, and thereby, his dumper dragged to the driver side bringing the dumper to the wrong side and collided with the dumper driven by the husband of the Appellant of this First Appeal. Learned Advocate for the Appellant in support of his submission that, "deceased-Dhirajbhai was not negligent at all and the driver of the other dumper was negligent to the extent of 100%", relied upon the panchnama (Exh. 19), the deposition of one Madansing who claims to be the eye-witness-Exh. 42, the actual positioning of the vehicles which emerged after the accident, recorded in the panchnama. The Tribunal has appreciated all the aforesaid material with due care. Paragraph No. 11 is the one wherein the Tribunal has considered the evidence of Madansing as under:

Mafatsing (Madansing) who is examined at Exh. 42 states that he had seen the accident. He was at the canteen at the time of incident. The dumper was coming from the opposite direction. Kiransinh was driving the dumper.

The dumper's tyre was busted whereby the another dumper came from the opposite direction and then Kiransinh's dumper dashed with the dumper of Dhirajbhai.

3.2 In appreciating this evidence, the Tribunal has observed in the same Paragraph as under:

Now, this witness is a got-up witness in the sense that in the midst of night, he could not be at the canteen. He never informed Police nor his statement was recorded; nor he was at the place of incident when the scene of offence-panchnama was prepared. He has never disclosed this fact of incident to anybody at all, before he deposed before the Tribunal. He was working at the different tea lorry and not at the canteen. He, therefore, would not be at the place of incident at that point of time. He is totally a got-up witness. He admits that his attention was drawn when he heard the noise. Therefore, he is a chance witness. Not only that but he is concocted one and has come forward to help Kiransinh. Therefore, his evidence cannot be believed. He also admits that at the time of incident there was total dark at the place of offence (incident). Therefore, the story that he had seen the incident is totally a got-up one.

(Emphasis supplied)

3.3 This Court is of the opinion that conduct of this witness is not natural. The question remains that, if he was present at the time of accident and if he had seen the incident, he ought to have been present at the site. But the fact is that his presence is not found either in the F.I.R. which is lodged by one Shri Prahladbhai Patel-employee of the owner of both the dumpers; or in the evidence of Mahendrasinh Himmatsinh, who happens to be the driver of the dumper of the same owner, who reached the scene of accident first in point of time. It was he who informed Prahladbhai Shivilal Patel who in turn lodged F.I.R.

3.4 Learned Advocate for the Appellant read whole of the deposition of said Madansing-Exh. 42. His deposition is found to be biased one, because if it is believed that, the front wheel of driver side of dumper No. GTS 6217 had burst, then if the driver of the opposite dumper had taken care, the accident could have been avoided. The Tribunal is right in inferring that this witness had entered the witness box only with a view to help Kiransinh - the driver of Dumper GTS 6217. He has stated that, "after the incident, he was busy in arranging to take the dead body to the resident of Kiransinh, whose family members were at Gora Colony at Dam site. It is a matter of common knowledge that when an accident takes place and if somebody is dead, then that dead body cannot be taken by anybody by making necessary arrangements to his place. The accident is required to be investigated by police, and it is only after necessary police procedure that the dead body can be taken to the family members of deceased-

Kiransinh. Assuming that this witness was busy in doing all this then why his presence was not noticed by Mahendrasinh Himmatsinh-driver of the other dumper, who reached the scene of accident first in point of time, who informed the complainant an employee of the owner of both the dumpers-Prahladbhai Shivlal Patel. No explanation come on record as to why this man was not noticed by the Police when it reached the scene of occurrence.

3.5. In view of the aforesaid discussion, this Court is of the opinion that the Tribunal has rightly held this man to be a got-up one, if not so, a chance witness and definitely entering the witness box only with a view to help Kiransinh-driver of dumper bearing Registration No. GTS 6217. It will be proper to take note of the fact that this witness has stated in the cross-examination that, "he revealed these facts for the first time before the Tribunal during his deposition". He also stated in cross-examination that, "till date he has not informed these facts to the police". That being so, in the opinion of this Court, the evidence of this witness could not have been appreciated in any other manner than in which it is appreciated by the Tribunal.

4. The appreciation of the contents of the panchnama, wherein it is stated that, "dumper bearing Registration No. GTS 6217 is standing, facing towards south; there is extensive damage to both the dumpers to an extent that not only the steering wheel is broken, the spring plates of the driver's side are also found to be broken. It is a matter of which judicial notice is required to be taken that these spring plates are thick enough to bear the load of the goods loaded in the vehicle. This being a dumper meant for transporting stones, and therefore, spring plates are likely to be proportionately thicker than the spring plates used in other transport vehicles; the diesel tank is also found to have been torn. The front side of dumpers, is found to have been broken; the right hand side front wheel is found to have been burst". Now, coming to the other dumper i.e. GRV 6054 driven by the husband of the present Appellant is also found to have been extensively damaged. The driver door is broken and found hanging; the radiator and engine is damaged; the steering wheel of the dumper is also damaged; the diesel tank is broken and diesel is found on the road; the front excel of the dumper is found bent; the driver side front wheel is found deflated; is found just and proper.

4.1. After appreciation of the contents of panchnama, the finding is recorded by the learned Tribunal that, both the drivers were equally negligent. This finding cannot be found fault with though it is argued by the learned Advocate for the Appellant that the Tribunal ought to have held that deceased Kiransinh-driver of GRV 6217 was wholly negligent because it was his dumper which came on wrong side and collided with the dumper driven by the deceased husband of the Appellant. The learned Advocate for Appellants submitted that it is specifically mentioned in panchnama that right front wheel of GRV 6217 had burst. Besides, it is also on record that it was GRV 6217 which came on wrong side, and therefore, his driver (deceased-Kiransinh) is to be held 100 % negligent and not

the deceased husband of the Appellant herein.

4.2. This argument cannot be accepted for the simple reason that bursting of tyre cannot be considered to be act attributable to the driver. It is a "real accident". Once tyre gets burst, it is natural that driver cannot control the vehicle. It is a misfortune of both the drivers that the time and place of "bursting of tyre" was such that both the vehicles collided resulting into death of both the drivers.

5. The actual situation on the scene of accident it is to be noticed that the road at the place is 23 "wide i.e. tar road. On the north side, there is mud solder of the width of 3"; whereas on the south the mud solder is that of 20". Dumper bearing Registration No. GRV 6217 is found to be standing facing south and towards south beyond tar road there was a space of 20" where the tanker could have gone if it had not hit the tanker driven by Dhirajbhai. Meaning thereby, if Dhirajbhai was driving his truck dumper at a moderate speed and if he had noticed the busting of tyre of the opposite dumper, he could have avoided the accident by allowing that dumper to go at a kachha wad having width of 20" towards south. But that did not happen and an accident took place wherein front portion of both the dumpers got damaged extensively.

6. Learned Advocate relied upon a decision of the Hon"ble the Apex Court in the case of Usha Rajkhowa and Others Vs. Paramount Industries and Others, and submitted that the Tribunal has erred in recording a finding of equal negligence on the part of both the drivers. In this regard, he relied upon the observations made by the Court, more particularly, Paragraph Nos. 6 and 8 which reads as under:

6. This award of the Tribunal was appealed against by the present Appellants u/s 173 of the Motor Vehicles Act, 1988. It was asserted in the appeal that the Tribunal in its award should not have limited the liability to 50% by apportioning between both the involved vehicles, as there were no pleadings or evidence in support of such apportionment. It was specifically stated in the appeal memo that the Tribunal itself had not held any contributory negligence on the part of Maruti car nor had it given any finding, and thus, the claim could not have been reduced to 50%, applying the theory of contributory negligence. The High Court firstly endorsed the finding of the Tribunal that Oriental Insurance Company Ltd. was not liable to pay any compensation, since the policy was an Act policy. The High Court then went into the exercise of appreciation of evidence and observed that the Tribunal had held that the accident took place due to contributory negligence of the drivers of the truck and the Maruti car. Considering the evidence of P.W. 3, it referred to the stray sentence, which we have quoted earlier, to the effect that the witness was not able to say clearly as to which vehicle was at fault. On this very basis, the High Court endorsed the so-called finding of the Tribunal that it was an act of contributory negligence. The High Court, therefore, held both the vehicles equally responsible for the accident and proceeded to dismiss the appeal. It is this judgment, which has fallen for

consideration before us.

8. In spite of our minute scrutiny of the award, we have not been able to even find a mention of words "contributory negligence" in the award passed by the Tribunal. There is, in fact, no finding given by the Tribunal as regards the contributory negligence. The subject is discussed in Paragraphs 10 and 11, where we do not find any specific finding to the effect that Maruti car was guilty of the contributory negligence. It is only because the amount of compensation is restricted to the 50% of the assessed amount that we have to infer that the Tribunal had given a finding of contributory negligence. Even at the cost of repetition, we may say that the words "contributory negligence" nowhere appear in the award passed by the Tribunal. There is only one stray statement in the award, concerning the evidence of P.W. 3-Madhuriya Rajkhowa to the effect that he failed to state which of the vehicles was actually at fault. On this backdrop, when we see the impugned judgment, very interestingly, the judgment mentions in Paragraph 9:

In the present case at hand, the learned Tribunal has held that the accident took place due to contributory negligence of driver of the truck and the Maruti car.

We are afraid, such sentence is not to be found in the award of the Tribunal. We do not know, as to where has this finding been found by the High Court in the award. The High Court then referred to the evidence of P.W. 3 and referred to the same sentence by P.W. 3. It is on the basis of this stray sentence that the High Court chose to confirm the finding of the Tribunal (which is not to be found) regarding the contributory negligence. Such appreciation is clearly erroneous.

6.1 In the opinion of this Court, apportionment of negligence is a pure question, which is to be answered on appreciation of facts which vary from case to case. No decision can provide a mathematical formula for apportionment of negligence.

6.2 In a decision in case of Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, the Hon"ble the Apex Court has observed in Paragraph No. 12 as under:

...However, we have noticed the reasoning and finding of the M.A.C.T. recorded under Issue No. 2. It is the evidence of Rajesh Kumar Gupta-P.W. 2 who was travelling in the Maruti car along with the deceased Raj Kumar Dugar on the day of the accident that he also suffered some injuries in the said accident. He stated that while coming from Digboi, the Maruti car being driven by the deceased met with an accident at a place near Kharjan Pol. Before the accident, Raj Kumar Dugar noticed a passenger bus coming from the opposite direction and the movement of the bus was not normal as it was coming in a zigzag manner. The Maruti car being driven by the deceased Raj Kumar Dugar and the offending bus had a head- on collision. The M.A.C.T. has not accepted the evidence of P.W. 2 to prove that the driver of the offending bus was driving the vehicle in abnormal speed. If the bus was being driven by the driver abnormally in a zigzag manner, as P.W. 2 wanted to believe the Court, it was, but natural, as a prudent man for the deceased to have taken due care and precaution to avoid head-on collision

when he had already seen the bus from a long distance coming from the opposite direction. It was head-on collision in which both the vehicles were damaged and unfortunately, Raj Kumar Dugar died on the spot....

(Emphasis supplied)

6.3. In the case on hand, if the deceased-Dhirajbhai - husband of the Appellant No. 1 had taken care, he could have avoided the accident and to that extent, he has definitely contributed to the accident. In the opinion of this Court, the Tribunal has rightly decided the question of apportionment as fifty-fifty.

7. So far as the present First Appeal is concerned, the present First Appeal is challenging only the judgment and award rendered in M.A.C.P. No. 452 of 1986. As mentioned hereinabove M.A.C.P. No. 452 of 1986 is decided by common judgment and award rendered in M.A.C.P. No. 737 of 1986, and therefore, if at all the present Appellant wanted to challenge the question of negligence he was required to file two appeals. Be that as it may, the fact that this Court does not find the apportionment of negligence of the Tribunal any way illegal, non-filing of 2nd appeal pales into insignificance. It was only in the event if the Court wanted to decide afresh the proportion of negligence, the question of other appeal being not before the Court would have become material.

8. Coming to the quantum aspect learned Advocate vehemently submitted that the Tribunal has committed grave error in not believing that the amount of Rs. 2,20,800/- was required to be awarded. He submitted that the Tribunal has committed an error in awarding only an amount of Rs. 1,50,000/-. In this regard, learned Advocate invited attention of the Court to Paragraph No. 15 of the common judgment and award wherein the Tribunal has considered the question of quantum which reads as under:

15. Then the next question which arises for consideration is as to what compensation the applicants are entitled to M.A.C.P. No. 452 of 1986. The applicants have in all claimed compensation of Rs. 2,20,800/-. It is the say of one Rayjibhai the father of the deceased Dhirajbhai at Exh. 39 that his son was working as a driver and was earning Rs. 650/- per month plus he was getting overtime to the extent of Rs. 250/- per month. Therefore, the total amount comes to Rs. 900/-. Over and above this income, the deceased was also doing repairing work of watches and was also looking after agriculture. But this part of the story of Rayjibhai cannot be believed as the deceased was working as a driver and was also doing overtime. So, he had no time to repair watches and look after the agriculture. In cross- examination, Rayjibhai had to admit that he has no evidence to show that the deceased was repairing wrist watches and was earning Rs. 300/- per month. He has also admitted that for a person to go from Kevadia to Bordi village, one has to go to Baroda and from Baroda, one has to catch the bus from going to Bordi. Therefore, it was impossible for the deceased to look after agriculture. Therefore, this part of the story of Rayjibhai is not believable. Therefore, the income of the deceased is estimated at Rs. 900/- per

month which multiplied by 12 would come to Rs. 10,800/-. Out of this amount, the deceased would at least spend Rs. 3,300/- per year, on himself which if deducted would leave a balance of Rs. 7,500/- for his Defendants, and therefore, that will be datum figure. Taking into consideration the uncertainties and improbability of life, it would be just and proper to apply 20 years purchase factor to the facts of the present case. Therefore, Rs. 7,500/- x 20 would come to Rs. 1,50,000/-. But the applicants would be entitled to only Rs. 75,000/- as compensation as the deceased is also held to be responsible to the extent of 50 per cent in causing the accident. Therefore, in all the applicants are awarded Rs. 75,000/- as compensation, except applicant No. 3-Rayjibhai who is the father of the deceased and who is tilling the land was not dependent on the income of the deceased and also applicant Nos. 5 and 6 who are the brothers of the deceased and not dependent upon the income of the deceased, and who are also not the legal representatives of the deceased as per the provisions of Hindu Succession Act. Therefore, only applicant Nos. 1, 2, 4 are entitled to the compensation being the legal representatives of the deceased and dependent on the income of the deceased.

9. Learned Advocate for the Appellant has submitted that the Tribunal has erred in not taking into consideration the prospective income of the deceased who was only 23 years. Not only that the Tribunal has also not taken into consideration the relevant aspects while deciding the amount which is to be deducted towards his personal expenses. The Tribunal has deducted Rs. 3,300/- per year i.e. almost one-third amount. Learned Advocate for the Appellant submitted that when the deceased was supporting a family of his father, having two brothers along with his wife and a minor son, the amount deducted towards his personal expense is on a higher side and that amount should have been a nominal one, may be about 20% to 25%. Besides, he submitted that the Tribunal has not awarded any amount under any other head which are common in the matters of Motor Accident Claims, like loss of estate, loss of consortium which may be conventional amount when the deceased was married and has survived by his widow. Conventional amount is required to be awarded under various other heads like the funeral expenses, transportation of body, etc.

10. As against that, Mr. Parikh, learned Advocate for the Insurance Company has vehemently submitted that the Tribunal has granted multiplier of 20 which by any standard is on a higher side. He submitted that the Tribunal has taken into consideration Rs. 250/- by way of overtime income and that has been directly added to the income of the deceased. He submitted that if the same amount which is awarded is bifurcated under various heads the total will not vary, and therefore, no further amount is required to be awarded and First Appeal is required to be dismissed.

11. Taking into consideration the rival submissions advanced by learned Advocates for the parties and taking into consideration Rs. 650/- per month as wages and if the present method of calculation is applied, 50% of which is to be

added to reach to prospective income that comes to Rs. 975/- and to make a round figure, it comes to Rs. 1,000/- and of that one-fourth is deducted towards personal expenses, it comes to Rs. 750/- per month. That is multiplied by 12 bringing the amount of dependency per annum Rs. 9,000/- and giving multiplier of 18, it comes to Rs. 1,62,000/- and Rs. 10,000/- is to be added under the head of loss of estate and Rs. 10,000/- is added under the head of loss of consortium, and Rs. 5,000/- is added towards funeral expenses, the total comes to Rs. 1,85,000/- and if it is reduced by 50 % the amount will come to Rs. 92,500/-. Whereas, Rs. 75,000/- is already given, so additional amount of Rs. 17,500/- is ordered to be given. Taking into consideration the time- gap between date of award and date of deciding this First Appeal, the figure of Rs. 17,500/- is increased to Rs. 25,000/-. The award is modified to that extent. So far as other directions issued by the Tribunal, remains as it is. The First Appeal is partly allowed in aforesaid terms.

12. At the request of the learned Advocate for the Appellant, it is clarified that it will be open for the Appellants to pursue the remedy available to them under any other law.