

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/FIRST APPEAL NO. 5489 of 2008****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS. JUSTICE GITA GOPI**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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RAJPUT ARVINDSING GIRVATSINH THROUGH
Versus

RAJABMIYA NANNUMIYA MALEK & ORS.

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Appearance:

MR RC JANI(357) for the Appellant(s) No. 1

MR VIBHUTI NANAVATI(513) for the Defendant(s) No. 3

RULE NOT RECD BACK for the Defendant(s) No. 2

UNSERVED EXPIRED (R) for the Defendant(s) No. 1

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CORAM: HONOURABLE MS. JUSTICE GITA GOPI**Date : 20/03/2024****ORAL JUDGMENT**

1. The challenge is given by the injured claimant to the judgment dated 31.01.2008 passed

by Motor Accident Claims Tribunal, Kheda at Nadiyad in MACP No.48 of 1995.

2. Learned advocate Mr. Vishrut Jani for Advocate Mr. R.C. Jani for the appellant submitted that 10% contributory negligence has been erroneously concluded, which is contrary to the evidence on record. Further stated that the income proof was on record, and the learned Tribunal has considered that same, however, has made deduction from the income, which is not permissible, and submitted that only the tax would be deducted, and, thereafter the income has to be assessed accordingly.

2.1 Advocate Mr. Jani submitted that injury suffered by the claimant had forced him to retire from the job as clerk-cum-cashier from the Bank, and the fact of early retirement has been proved by certificate, Exh.58, which was issued by the Branch Manager of the Bank, and that fact has

been corroborated by way of deposition, Exh.59, of the Branch Manager. Hence, Advocate Mr. Jani submitted that after the accident his mental health was not stable, which could not allow him to continue in job, and, thus had to resign; thus, urged to consider the disability as 100%.

3. Per contra, learned advocate Mr. Nanavati submitted that the fact of resigning from job owing to the mental health condition of the claimant on account of the accident, could not be proved, and, thus stated that it was only because of inquiry pending against him that he was constrained to resign from the service, which was accepted on 08.12.1995, and, thus, would not entitle him to claim 100% functional disability.

4. The facts, as could be culled out, suggest that on 14.07.1994 at 8:20 night hours, the applicant serving in Kheda District Madhayasatha Co-operative Bank, Balasinor, was

proceeding towards Sangot from Balasinor on his Motorcycle No.GJG-2054. He reached towards canal near I.T.I. College on Savaliya Road driving his motorcycle on the correct side of the road. At that time, it is stated that, Tanker No.GJ-2T-8735, owned by opponent no.2 insured with opponent no.3, came in full speed, in rash and negligent manner from the wrong side and dashed the motorcycle; thereby the present claimant as motorcyclist was thrown down and sustained serious injuries on the head and immediately was taken to Balasinor Hospital, and thereafter shifted to Ahmedabad Hospital.

4.1 The Tribunal has considered the fact that the accident had occurred on pakka tar road, which is 22 ft. in width with 3 ft. border on the side of the road. The bullet, on which the claimant was travelling, was facing north at 20 ft. away from the canal. The front wheel, which got separated, was bent. Dicky, head light,

mudguard of the bullet were broken. The damage to the bullet was found to be of Rs.12,000/-. While according to the panchnama, the Tribunal observed that on the northern side of the bullet at about 30 ft. away on the northern side of the canal on left hand side, the Tanker was found lying in the drainage, and the rear side of the Tanker was on the kachha margin area of the road, with the front in the drainage. It was noted that the Tanker was facing toward east and the front portion of the Tanker was found to be bend. The wheel marks by applying brakes was found upto 5 ft. at length from the rear side of the Tanker.

4.2 The FIR was given by one Nileshkumar Shantilal Suthar, who was a pillion rider to the bullet, who had joined that claimant while was on the road, after filling the petrol from petrol-pump, they were heading towards Balasinor, and according to the complainant, the Tanker dashed them and caused injuries, and he stated that the

Tanker had gone on the road and landed in the gutter on the side of the road. As per his complaint, the driver left his vehicle and fled away from the place of incident.

4.3 The complainant, who had given the complaint, was examined at Exh.29. His affidavit in examination-in-chief, further states that, they were on correct side of the road, and on a very normal speed, while the Tanker had come in a full speed, in a rash and negligent manner, and the Tanker driver had ran over the bullet.

4.4 It appears that this deposition of the witness has not been challenged by the respondents. The witness — Surendrabhai Girvatsinh Rajput, who gave evidence at Exh.24, was the younger brother of the claimant. His deposition is in form of affidavit of examination-in-chief, which was produced at Exh.24, he had stated about the accident and even

the fact of claimant loosing memory power, and also about his mental and physical condition. According to him, the Tanker No.GJ-2T-8735 had come on the wrong side and had dashed with the motorcycle and the claimant along with the motorcycle was flunged down, and stated that the direction of motorcycle also got changed, and the claimant suffered sever injuries. In the cross-examination, the witness admit that he has no personal knowledge of the accident.

5. Exh.65, Doctor Balkisan N.Desai, Neurosurgeon, had assessed permanent disability sustained because of the head injury on account of the vehicular accident. The claimant had complaint of headache, loss of memory and intelligence, excessively loosing temperament, severe stubbornness, behavioral changes etc. The Doctor had noted that after the head injury following the vehicular accident on 14.07.1994, he had become unconscious. His primary treatment

was at Balasinor Hospital and then was transferred to Ahmedabad for expertise neurosurgical treatment. He was admitted at Rajasthan Hospital and his C.T. Scan of the brain was done, which was suggestive of cerebral Oedema with multiple contusions and sub. Arachnoid haemorrhage. He was treated conservatively. He remained unconscious for few days. His follow-up scan of the brain was done on 08.08.1994, and had regular follow-ups after his discharge from the hospital. His higher functions like memory and intelligence are depleted, and he was referred to clinical psychologist and psychotherapist for psychometry for assessing I.Z., memory and B.G.T. which are all affected and are subnormal, and he has emotional disturbances under unusual stress. The Doctor has opined that his symptoms were due to his head injury, causing brain contusion and sub, archnoid haemorrhage, causing parenchymal and organic brain damage, resulting in an

irreversible brain damage, producing permanent disability, which is assessed at 57.5% body as a whole, according to Kessler's Y Dr. R.M. Jhala.

6. The factum of resigning owing to some department inquiry could not be proved on record. The claimant had retired on 30.09.2006, which fact was proved by the Branch Manager of the Bank, and the document of Doctor could also prove that his mental health was not appropriate to continue in the job, hence, there has been 100% loss in income to the claimant, which can be considered as functional disability.

7. The income, at the time of accident, of the claimant was Rs.7,542/-. Rs.500/- was the income tax and Rs.20 was the professional tax. Deducting Rs.520/-, the income receivable would be 7,022/-. The claimant was 42 years and 9 months of age at the time of accident. The multiplier applicable would be 15. Considering

the job in the Bank in accordance to the age, 30% prospective rise in income is to be considered, which comes to Rs.2,106/-. Hence, the monthly income would come to Rs.9,128/-. Annually, applying the multiplier of 15 with 100% functional disability, the future loss of income would come to Rs.16,43,040/-.

8. The claimant, as per the record considered by the Tribunal, could not have earned for about six months, hence, considering the evidence on record at Exh.46, the Tribunal has granted amount for six months under the head of actual loss of income. However, the resignation of claimant was accepted on 08.12.1995, at Exh.51, and the salary record as produced at Exh.46, shows the salary upto May, 1995. Hence, no amount is granted under the head of actual loss of income.

9. The medical expenses, as could be proved

is Rs.20,000/-. The Tribunal has granted Rs.5,500/- for special food and diet, Rs.3,500/- for attendance charges, Rs.2,230/- as transportation charges. Hence, under the head of medicines, doctors fees, special diet, attendance charges and transportation charge, Rs.31,320/- has been granted.

9.1 The Tribunal has granted only Rs.15,000/- under the head of pain, shock and sufferings. The said amount is on a very lower side, as the injury has affected the mental condition of the claimant, which had led to retirement from the job, since his condition was not suitable to carry on with his job. The said mental condition would continue through out his life, and that pain suffering would be larger than that of the physically incapacitated person, as the same would have come as a shock to the claimant, which had led to loss of job, hence, this Court considers that amount of Rs.2,00,000/-

is required to be allowed under the head of pain, shock and sufferings.

9.2 Learned advocate Mr. Jani has prayed for amount for the loss of amenities of life. The said contention cannot be entertained in view of the observation in para-15 of **Raj Kumar And Another Vs. Ajay Kumar And Another**, reported in (2011) 1 SCC 343. The Hon'ble Supreme Court while observing that if the compensation is awarded by treating the loss of future earning capacity as 100%, the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may be awarded under those heads. Para-15 is reproduced hereinbelow:

"15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation

separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may."

9.3 The amount as paid under pain, shock and suffering would be sufficient to take care of the token amount, thus, has not been separately granted.

10. In accordance to the evidence, which has come on record of Nileshkumar Shantilal Suthar, the complainant, whose evidence has not been challenged by way of cross-examination, and the FIR read with panchnama, the fact remains that the accident had taken place at the night hours. The claimant was on his own side of the road. While the Tanker had come on the wrong side, and

the brake marks on the road shows the speed at which the Tanker was running on road. The Tanker driver was not examined before the Tribunal. The fact of he being on the wrong side itself suggests that he was rash and negligent in his driving. The dash was very hard, as the bullet also lost its direction, and the Tanker had landed in the drainage on the side of the road.

10.1 Considering the facts and evidence on record, this Court is of an opinion that Tanker driver is 100% negligent. The evidence of eye witness - Nileshkumar Shantilal Suthar has not been challenged. The Tribunal has attributed 10% negligence to the claimant observing that the claimant could have seen the Tanker coming from the opposite. The said observation would be fallacious on record, since the evidence itself proves that the Tanker had come on the wrong side of the road. The claimant driver would not have even imagined of a Tanker to enter his side of

the road, and the requirement of maintaining distance would be, for the vehicle going ahead on the road. The driver of the vehicle would have to be mindful of those vehicles, which are on his side of the road, while could not have even imagine of any vehicle crossing the road, to come on the wrong side to cause the accident. In view of the fact, that the accident occurred in night hours and the Tanker driver had come on the wrong side of the road, 100% negligence is to be attributed to the Tanker driver.

11. In view of the above, compensation under different heads would be:

Heads	Amount
Future loss of income	Rs. 16,43,040/-
Medicine, Doctor Fees, attendance charges and transportation	Rs. 31,320/-
Pain, shock and sufferings	Rs. 2,00,000/-
Total	Rs. 18,74,360/-

12. The Tribunal has granted amount of Rs.3,27,000/-, however, after deducting 10% negligence on the part of the claimant, granted Rs.2,95,000/- at the rate of 9% per annum from the date of claim petition till 31.12.2002 and at the rate of 7.5% per annum from 01.01.2003 till the amount is finally deposited before the Tribunal.

12.1 Thus, the claimant would be entitled to get Rs.15,79,360/- (18,74,360 – 2,95,000) as enhanced compensation at the interest rate of 7.5% from the date of claim petition till realization. The enhanced amount be deposited before the concerned Tribunal within eight weeks from the date of receipt of writ of this order. Total amount be paid to the claimant.

12.2 It is stated by Advocate Mr. Jani that the claimant would be in a position to collect the amount. It is directed that the total amount

be deposited in the Bank Account of the claimant by Account Payee Cheque/NEFT/RTGS on verification of identity.

13. In the result, the appeal is partly allowed. The impugned judgment and award dated 31.01.2008 passed by Motor Accident Claims Tribunal, Kheda at Nadiyad in MACP No.48 of 1995 stands modified to the aforesaid extent. No order as to costs.

14. Record & Proceedings be sent back to the concerned tribunal forthwith.

(GITA GOPI,J)

Pankaj