HIGH COURT OF GUJARAT *(D.B.)*

KUSUMKUNVERBA WD/O NARPATSINH RAMSINH ZALA
V/S
UMARBHAT KAMALUDDIN SIPOY

Date of Decision: 31 July 1980

Citation: 1980 LawSuit(Guj) 136

Hon'ble Judges: V V Bedarkar, D H Shukla

Eq. Citations: 1981 GLR 910, 1981 GLH 267, 1982 ACJ 578

Case Type: First Appeal

Case No: 1265 of 1979

Head Note:

TORT OF NEGLIGENCE In awarding compensation other benefit available e.g. pension, gratuity etc., to the dependents of the deceased tort feasor cannot take advantage of such benefits Pension is paid for the past services rendered Such amount cannot be deducted from quantum of damages Change of law in England may be taken note of. TORT OF NEGLIGENCE Scooter belonging to the deceased riden by third person Accident happening because of contributory negligence of such scooter driver Deceased also can be said to be responsible for such contributory negligence Contributory negligence considered at 25% and therefore resultant reduction in total amount awarded.

When the Parliament makes a statute it makes it with a view to meet with the exigencies of time and also to meet with some settled position which was not beneficial to the society. If there is amendment in England can it not be considered on equitable basis to the cases in India where such benefits may or may not be deducted ? Whatever the benefits are available to the legal representatives of the deceased out of the accident are purely on a different

footing which would have been available on the death. The accident caused by the opponents is a tortious act on their part and it is for that reason that the defendants or the legal represe- ntatives of the deceased are entitled to claim the amount. The amount of gratuity insurance benefits or provident fund or pension would have been available to the legal representatives of the deceased even if the deceased would have died a normal death. So a line of distinction must be made where the accident has cut short the life of a man for which somebody is to be held liable at tort and other type of death where there is no liability fastened to anybody. If the benefits that would have been available by the normal death or death without any tortious act can be cut down to the benefit of the tortfeasor then it would be giving a bonus for whatever he has done. He must suffer the share of his act and he could not get the advantage because from other source the legal representatives are going to get some amount due to the death of the deceased. (Para 34) Pension amount is available to the retired person or the family if he dies because he has undergone a particular number of years of service. So it is a benefit for the past services rendered and in fact the pension is a delayed remune- ration to be given to a person after he retired. Therefore it cannot be an amount which should be deducted from the quantum of compensation available. (Para 35) Held therefore that the benefits available to a person after his retirement which would accrue to his legal representatives after his death such as pension gratuity provident fund etc; cannot be an amount to be set off in favour of a wrongdoer who has caused accident and has either injured or killed the person because the benefits which are otherwise available are not on account of the accident but on account of death under whatever circumstances. In view of this there should not be any deduction for the pensionable amount. (Para 37) TORT OF NEGLIGENCE-Scooter belonging to the deceased rider by third person - Accident happening because of contributory negligence of such scooter driver- Deceased also can be said to be responsible for such contributory negligence-Contributory negligence considered at 25% and there fore resultant reduction in total amount awarded. In the instant case the scooter belonged to the deceased. It was specifically with the permission of the deceased that P was driving it. and it was for the pur- pose of both of them. So if any tortious act would have been committed by P at that juncture the assessed would have been victoriously liable. As between the plaintiff and the defendant each is identified with any third party for whom he is victoriously responsible. The rule that the negligence of a servant in the course of his employment is imputed to his master applies whether the master is the plaintiff or the diffident. So this position very

clearly shows that the applicants will be burdened for the tortious act of P. even though they are the applicants and if Ps contribution towards the negligence is considered to be 25 per cent then there would be resultant reduction in the total amount to be awarded. (Para 38) Sushila Devi v. Ibrahim dissented from. L.I.C. of India v. Heirs & L. Rs. of deed. Naranbhai Munjabhai Vadhia Sheikhpura Transport Co. Ltd. v. Northern India Transporters Insurance Co. Ltd. Bhagwati Devi v. Ish Kumar Parry v. Cleaver referred to.

Advocates: K R Vyas,K S Nanavati, D K Trivedi, G N Desai

Reference Cases:

Cases Cited in (+): **1**

Cases Referred in (+): **7**

Judgement Text:-

Bedarkar, J

[1] This is an appeal against the judgment and award dated 11-4-1979 passed by the learned Motor Accidents Claims Tribunal, Bhav-nagar, in Motor Accidents Claims Case no. 46 of 1978. The claim application was filed by the appellants for compensation of Rs. 1,35,000/- under sec. 110-A of the Motor Vehicles Act, 1939 (hereinafter referred to as'the Act') for the death of Narpatsinb Ramsinh Zala, the deceased husband of applicant no. 1 and father of applicants nos. 2, 3 and 4.

[2] On 29-1-1978, at about 12.00 noon, the deceased was travelling from Bhavnagar and was proceeding to Sihor on a Scooter which was driven by one Pinakin Bhaskerrai Bhatt. They passed through Vartej on Bhavnagar-Rajkot road and approached the Trident crossing, and after that crossing was crossed and when the scooter was just to enter the Rajkot side, it is the case of the applicants, that all of a sudden, S.T. Bus, bearing no. G.T.E. 5636 came from the opposite side in a very excessive speed without blowing the horn, or reducing the speed or applying the brakes, and it was driven in a very haphazard and zig-zag manner. This bus was driven by the opponent no. 1. The scooterist Pinakin Bhatt had seen this bus and, therefore, he had already reduced the speed of the scooter and stopped it. But it is the case that the S.T. Bus came and dashed with the pillion driver of the scooter and, therefore, the deceased fell down on

the road. It is also the case that after the deceased fell down from the scooter, the bus ran over him and, therefore, the deceased died on the spot.

[3] This application was contested by the opponents - S. T. Driver and Gujarat State Road Transport Corporation. It was contended that the scooterist was trying to over-take a private car and a truck and in spite of having seen the bus coming from the other side, the scooterist proceeded and in that he lost the balance and applied the brakes and therefore, the deceased Narpatsinh fell down and received injuries, and there was no touch of the bus either to the deceased or to the scooter or any part of the driver of the scooter. It was, therefore, contended that the S.T. Bus driver was not negligent at all.

[4] After hearing the case, the learned Tribunal came to the conclusion that the S.T. Bus did not dash with the deceased, but he fell down because the scooter was stopped suddenly by the scooter driver and, therefore, dismissed the claim application.

> [His Lordship after discussing evidence, held that in the peculiar circumstances of the case, the negligence can be considered at the proportion of 75:25 for the bus-driver and the scooter driver respectively. His Lordship further observed.]

[5] Now, the important question that has cropped up is two-fold. First is whether Pinakin was also a joint tortfeasor; whether the applicants can claim the entire amount from one of the tortfeasors, i.e. the Gujarat State Road Transport Corporation or its driver, or whether this amount can be deducted at this very stage because Pinakin,, as alleged, war. driving the scooter of the deceased at the relevant time and, therefore, the deceased was the owner. The second point to be considered by us is whether there is any deduction required to be made from the amount available to the applicants because as per the evidence of Mr. Keshwani Ex. 31, in cross-examination, applicant no. 1 is getting a pension of Rs. 270/- and this amount would be available to her till 1985, and thereafter she will get Rs, 175/- per month till her death. It was suggested by Mr. Trivedi that this amount should be deducted from the amount that will be avail able to the applicants, because this is the amount received by the applicants due to the death of the deceased and, therefore, they cannot get double benefit. We propose to take up the second point about the deduction for the pension amount first.

[6] Apparently, we feel that whatever the opponents have to pay is for their tortious act.

When the amounts are to be paid to the aggrieved persons by the tortious act of somebody, the entire liability of that somebody, should be for the amount that would be available to the aggrieved persons. Can it be said that because from some other source the aggrieved persons are getting some amount, the person who does the tortious act will get premium for that ? Apparently looking, this proposition cannot be easily swallowed.

[7] Mr. Trivedi could support his argument from the judgment of the Madhya Pradesh High Court in Sushila Devi. v. Ibrahim, 1974 Accidents Claims Journal 150. This judgment of the Madbya Pradesh High Court allowed deductions for pension, insurance and gratuity - all the three aspects - and in that reliance was placed on various English decisions and Indian decisions. This judgment, however, differed from or did not agree with the judgment of our Gujarat High Court in Life Insurance Corporation of India v. Heirs and Legal Representatives of deceased Naranbhai Munjabhai Vadhia, (13 Gujarat Law Reporter 920 =1973 Accidents Claims Journal 226). Before proceeding to consider the reasoning of the Madhya Pradesh High Court, we would make it very clear that this Court in the aforesaid decision in clear and categorical terms observed in para 13 :

> ".....that insurance policy amounts were collateral benefit 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 injured party whose benefit could never go to the tortfeasor. It is only a like which can be deducted from the like and, therefore, intrinsic nature of the payment must be considered before any such deductions can be made. That is why any pension amount or retire-ment-cum-gratuity benefit which had the insurance element could never be deducted
>
> (Emphasis supplied)."
>
> These observations were made by this Court by considering the various rulings, some of which are considered by the Madhya Pradesh High Court also.

[8] When there is a judgment of our own High Court, a dissenting judgment of the Madhya Pradesh High Court cannot be looked into. But we would try to consider the reasoning adopted by the Madhya Pradesh High Court. In para 28 of the judgment, the

Madhya Pradesh High Court considered that in England, the law now has been drastically altered by the Fatal Accidents Act, 1959, and by sec. 2 of that Act it has put an end to the unfortunate state of affairs, and provided that in future, there shall not be taken into account "any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death". It was further observed by the Madhya Pradesh High Court:

> "It is needless for us to stress the immediate need for Law Reform in our country. Legislation on the lines of the Fatal Accidents Act, 1959, should be introduced forthwith. Unless this is done, the principles set forth in.....would still hold the field. Under the present law, in assessing damages under the Motor Vehicles Act, 1939, as it stands, the Court has to, as it must, set off against the probable loss which the dependant has suffered, any pecuniary advantage which he has received from any source, as a result of the death such as pension, whether contributory or non-contributory, insurance or gratuity."

In para 30, the Madhya Pradesh High Court has specifically disagreed with the view of this Court in the aforesaid decision observing :

> "The view taken by the Gujarat High Court in Life Insurance Corporation v. Kastttrben Naranbhai, to the contrary, does not appear to us to lay down good law for two reasons. In the first place, in the absence of any Act like the Fatal Accidents Act, 1959, of England, the benefits cannot be disregarded. Secondly, the learned Judges, with respect, fell into an error inrelying upon the principles laid down in Barry v. Cleaver (1969 1 All E R. 555) and Bradburn v. Great Western Rly Co. (1874-80) All E.R. Rep. 195). Both were cases of non-fatal accidents and therefore, somewhat different considerations came into play."

One thing cannot be ignored that so far as our Act is concerned, it does not specifically provide for deduction of such amounts. On the contrary under sec. 110-B of the Act, the Tribunal is required to fix such compensation which appeared to it to be just and that the power given to the Tribunal in the matter of fixing compensation under that provision is wide. This is what has been specifically held by the Supreme Court in Sheikh-pura Transport Co,

Ltd. v. Northern India Transporters' Insurance Co. Ltd.

1967 Accidents Claims Journal 206. So, when the Tribunal is empowered to fix the just compensation, it is to be fixed by considering the circumstances of each case.

[9] The question that arises is for deduction and whether the deduction should be made in view of the previous English rulings ignoring the necessity felt by the Parliament in enacting a specific provision not permitting the deductions. When the Parliament makes a statute, it makes it with a view to meet with the exigencies of time and also to meet with some settled position which was not beneficial to the society. If there is amendment in England, can it not be considered on equitable basis to the cases in India where such benefits may or may not be deducted ? Whatever the benefits are available to the Legal representatives of the deceased out of the accident are purely on a different footing which would have been available on the death. The accident caused by the opponents is a tortious act on their part and it is for that reason that the dependants or the legal representatives of the deceased are entitled to claim the amount. The amount of gratuity, insurance benefits or provident fund or pension would have been available to the legal representatives of the deceased even if the deceased would have died normal death. So, a line of distinction must be made where the accident has cut short the life of a man for which somebody is to be held liable at tort and other type of death where there is no liability fastened to anybody. If the benefits that would have been available by the normal death or death without any tortious act, can be cut down to the benefit of the tortfeasor, then in our view it would be giving a bonus for whatever he has done. He must suffer the share of his act and he could not get the advantage because from other source the legal representatives are going to get some amount due to the death of the deceased.

[10] The Delhi High Court in Bhagwati Devi v. Ish Kumar, 1975 Accidents Claims Journal 56, has considered this question from all as pects, but in a different way from the Madhya Pradesh High Court. It is held specifically that no deductions can be made on account of gratuity, pension, provident fund and insurance. In this ruling, it was specifically observed in para 41 as follows :

"The legal position with regard to the exclusion from consideration of any amounts that may be received by the dependants on account of insurance,

provident fund, pension, gratuity etc. is also far from clear and the examination of the question by the Courts both in England and in India have led to a conflict of judicial opinion. Until recently, it was believed in England that at common law, the general principle of deduction applied to life insurance and pension benefits and reference may be made in this connection to the case of Grand Trunk Rail Co. of Canada v. Jennings ((1888) 13 A.C. 800) and of Carling v. Lebbon (1927) 2 K.B. 108) but the rule in England was reversed by a series of legislative measures such as the Fatal Accidents Act, 1959 and Law Reform (Personal Injuries) Act, 1948 culminating in sec. 2(1) of the Fatal Accidents Act 1959, which provides that in assessing damages in respect of a person's death in any action under the Fatal Accidents Act, 1946 .....' there shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death'. Some new light on the subject was, however, thrown by House of Lords in a recent case of Parry v. Cleaver (1969 All. E.R. 555) in which Lord Reid, speaking for the majority, reviewed a number of earlier English decisions touching the question and held that in the computation of damages for loss of earning capacity the ill-health award to which the appellant was entitled, although it would have to be brought into account in respect of his loss of retirement pension, was not deductible in assessing damages for his loss of earnings. The famous case of Browning v. War Office (1961) 3 All E.R. 1089) was disapproved and an earlier decision of the Court of Appeal (1957) 2 All E R. 1168, was reversed. The House of Lords was not concerned with the Fatal Accidents Act, 1959 but Lord Raid referred to section of that Act and observed as follows :

'If public policy, as now interpreted by Parliament, requires all pensions to be disregarded in actions under the Fatal Accidents Act, 1 find it impossible to see how it can be proper to bring pensions into account in common law actions. Plaintiffs were formerly worse off under Lord Campbell's Act and I can think of no reason why the position should now be reversed so as to make them worse off at common law. In my judgment, a decision that pensions should not be brought into account in assessing damages at common law is consistent with general principles, with the preponderating weight of authority, and with public policy as enacted by Parliament and I would therefore so decide'.

It was further held that pension was fruit of services rendered by an employee in the past and was in the nature of deferred wages payable under a contract of employment for past services and therefore just as the amounts received by an injured under a contract of insurance were not deductible, the amount of disablement pension received by an employee were also not deductible."

We fully concur with this view of the Delhi High Court. So far as we are concerned, in the instant case the question is about the amount of pension. Pension amount is available to the retired person or the family if he dies because he has undergone a particular number of years of service. So, it is a benefit for the past services rendered, and in fact, the pension is a delayed remuneration to be given to a person after he retired. Therefore, it cannot be an amount which should be deducted from the quantum of compensation available.

[11] In Parry v. Cleaver (1969) All England Reports 555, to which reference is made in the judgment of the Delhi High Court referred to above, there is also an observation and we cannot resist our temptation of reproducing it :

".....It is generally recognised that pensionable employment is more valuable to a man then the mere amount of his weekly wage. It is more valuable because by reason of the terms of his employment money is being regularly set aside to swell his ultimate pension rights whether on retirement or on disablement..... That is why pensions are regarded as earned income."

In the same judgment i. e. Parry v. Cleaver (Supra), Lord Reid has observed :

"In dealing with damages under Lord Campbell's Act, such receipts were not disregarded until the law was altered by recent legislation. There, there was a universal rule. Here, there never was. The common law has treated this matter as one depending on justice, reasonableness and public policy."

It has been also observed in that judgment as under :

"It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer".

Looking to the facts of this case, we would add, "should the wrong-doer be benefited by deducting the amount which the dependants or heirs of the deceased Government servant would get from the Government for the services rendered by him till his death ? So far as the insurance is concerned, it has been specifically observed by Lord Reid in the aforesaid decision as under :

"Then I ask - why should it make any difference that be insured by arrangement with his employer rather then with an insurance company ? In the course of the argument the distinction came down to be as narrow as this : if the employer says nothing or merely advises the man to insure and he does so, then the insurance money will not be deductible; but if the employer makes it a term of the contract of employment that he shall insure himself and he does so, then the insurance money will be deductible. There must be something wrong with an argument which drives us to so unreasonable a conclusion."

We may add to this, that pension is an insured offer by the Government to a servant showing that after retirement or death amounts will be available to him or his family as pension. Of course, the case before Their Lordship in Parry v. Cleaver (supra) pertained to the disablement pension received by the injured person. But the nature of pension, received by a person would not make any change so far as the deduction is concerned, because the main element of pension is that it received by the Government servant for the services rendered by him.

[12] On all these considerations, we think that the benefits available to a person after his retirement which would accrue to his legal represe ntatives after his death, such as pension, gratuity, provident fund, etc., cannot be an amount to be set off in favour of a wrongdoer who has caused accident and has either injured or killed the person because the benefits which are otherwise available are not on account of the accident, but on account of death under whatever circumstances. In view of this, we think that there should not be any deduction for the pensionable amount.

[13] Then comes the first question as to whether (he amount of 25% can be deducted in this very matter. Normally if we hold Pinakin to be negligent by 25 per cent, and if the S. T. qua the Bus driver are directed to pay the entire amount awarded, then, as is common, one tortfeasor can recover that amount from the other tortfeasor by separate proceedings. But her(c) is a case where Pinakin was in the position of the agent of the deceased. So, if a third party would have tiled a case against Pinakin for his tortious act, the deceased or his legal representatives would have been vicariously liable for the tortious act of Pinakin Mr. Vyas for the appellants, at some stage wanted to impress upon us that this point was not before the Tribunal and, therefore, no proper evidence was led to show whether the scooter belonged to the deceased, and therefore, his submission is that this aspect should not be considered. It is too late for Mr. Vyas to suggest this, because Pinakin, Ex. 47, in this cross-examination has specifically deposed that the scooter was a new one and Narpatsinh (the deceased) got it in Government quota on 20th January 1978, and on the day of the accident, i. e. 29-1-1978. both of them were going to attend party. So, for all practical purposes, from the evidence on record, it can well be said that the scooter belonged to the deceased. It was specifically with the permission of the deceased that Pinakin was driving it, and it was for the purpose of both of them. So, if any tortious act would have been committed by Pinakin at that juncture, the deceased would have been vicariously liable. The point that was raised before us was whether this vicarious liability would extend to the contribution of Pinakin in the negligence ? If there would have been a third party, vicarious liability would have extended if Pinakin had contributed to the negligence. The question is whether the heirs and legal representatives of the deceased who have filed the claim application should be saddled with the deduction for the tortious act of Pinakin which would vicariously extend to the deceased and consequently to the legal representatives of the deceased ? This position is categorically elucidated in Winfield and Folowicz on Tort. 11th Edition, at page 142 under the caption "Contributory negligence of the plaintiff's servants or agents" as under:

"As between the plaintiff and the defendant each is identified with any third party for whom he is vicariously responsible. The rule that the negligence of a servant in the course of his employment is imputed to his master applies whether the master is the plaintiff or the defendant, (emphasis ours)."

So, this position very clearly shows that the applicants will be burdened for the tortious act of Pinakin even though they are the applicants, and if Pinakin's contribution towards the negligence is considered to be 25 per cent., then there would be resultant reduction in the total amount to be awarded. Therefore, the amount that would be available to the applicants would be Rs. 75,750/-.

Order accordingly.