

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 839 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? No

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy
of the judgement? No

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?
No

KANJI DESARJI RATHOD

Versus

OSMAN SIDIQ

Appearance:

MR SURESH M SHAH for Petitioner

NOTICE SERVED for Respondent No. 1

MR RAJNI H MEHTA for Respondent No. 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 12/05/99

C.A.V JUDGEMENT

This Appeal is filed by the original claimant
against the judgment and award dated 19.11.1997 passed by
the Motor Accident Claims Tribunal (Auxiliary), Kutch at
Bhuj dismissing Motor Accident Claims Petition No.245 of
1989. On 15.9.1998, this Court (Coram: Mr. Justice

S.K.Keshote) had issued Notice to the respondents to show cause why the Appeal should not be admitted and heard and finally decided at the admission stage. R & P was also called for.

2. Accordingly, the Appeal has been heard for final disposal. Heard learned Counsel for the parties. Perused the record and proceedings and the evidence available on record.

3. On 27.12.1988, the appellant was riding his TVS Moped. A truck bearing Regn. No.GTY 3988 and the aforesaid moped were involved in an accident which resulted into the appellant suffering six fractures on different parts of his body and seven stitches on his forehead. The appellant contended that the accident was caused by rash and negligent driving of the truck and that the appellant suffered serious injuries resulting into permanent disablement. The appellant was working as a watchman in a spinning mill and during day time, the appellant was in the business of selling ice-cream. The appellant was getting an income of Rs.1500/- to Rs.7000/- per month. The appellant claimed compensation of Rs.70,000/- with interest and costs.

4. In response to the Notice issued by the Tribunal, the driver and the owner of the truck did not appear. Respondent No.3 - Insurance Company appeared and filed its written statement at Ex.22. The allegations about the accident were denied, but the fact that the truck was insured with respondent No.3 was admitted. It was further alleged that the accident took place on account of negligence of the appellant himself and that when the accident took place, the appellant was riding the moped in a drunken condition.

The appellant - claimant examined himself as a witness but respondents Nos.1 & 2 neither appeared nor led any evidence. The driver of the truck was thus not examined as a witness. However, after considering the contents of the F.I.R. and the Panchnama and the oral evidence of the appellant, the Tribunal held that the accident took place on account of the sole negligence of the appellant. On that basis, the Tribunal dismissed the claimant's petition. It is against the aforesaid judgment and award that the claimant has filed the present appeal.

5. The learned Counsel for the parties have taken the Court to the relevant records and oral and documentary evidence on record. Mr.Mehul S.Shah, learned

Counsel for the appellant has submitted that when the driver did not step into the witness-box and no other eye witness was available, the Tribunal ought to have accepted the oral testimony of the appellant, and the truck driver ought to have been held solely responsible for the accident in question. The truck was being driven in an excessive speed in a negligent manner.

On the other hand, much has been said by Shri Mehta, learned Counsel for the Insurance Company that, in view of the F.I.R. and the Panchnama, it is clear that the appellant was in a drunken condition and that the accident had, therefore, occurred on account of the sole negligence of the appellant.

6. Having gone through the oral and documentary evidence on record, it appears that the Tribunal was unnecessarily swayed by the fact that it was the truck driver who reported the accident to the police authorities. The appellant was seriously injured in as much as he had suffered six fractures on various parts of his body and he had also received a serious wound on the forehead which required seven stitches. In this physical condition, the appellant could not have expected to go to the police station to report the accident. Hence, if the truck driver reported the accident to the police, no adverse inference can be drawn against the appellant merely on this ground alone. It is true that in the F.I.R. the truck driver had reported that the appellant was smelling of liquor. In the panchnama also, there is a reference that an empty bag of liquor was found in the dicky of the moped. However, when the driver has chosen not to file any written statement or to give any oral evidence, it is certainly a relevant factor which was required to be taken into consideration while assessing the evidence. The accident took place on the road between Mandvi - Sambharai Road. The road was of the width of only 12 ft. with kachchha shoulder of 4 ft. on either side. In his claim petition as well as in oral evidence the case of the appellant that the truck was coming from the opposite direction. The accident took place at about 8' 0 clock in the evening and the truck was driven with full light and hence the appellant was confused on account of being blinded with full light and the appellant's moped dashed with the rear portion of the truck. The appellant suffered serious fractures and seven stitches were required on his forehead. Pursuant to the complaint filed by the truck driver, the appellant was prosecuted, but he was acquitted by the Criminal Court. In view of absence of the truck driver, the Tribunal ought not to have held that the accident was

caused solely by the negligence of the appellant, because even if it is assumed that the appellant had consumed liquor and even if the appellant was following the truck in a moped, mere dash by the appellant with the rear side of the truck would not have caused such a serious impact on his moped or on his body. It must, therefore, be held that the accident was caused by the negligence of the truck driver as well as by the negligence of the appellant himself as the appellant might not have been able to maintain balance when he was facing the truck coming from the opposite direction and the front-wheel of the moped dashed with the rear portion of the truck.

At the same time, since the respondent's case that the appellant had consumed liquor cannot be discarded, it would be just and proper to fix negligence of the appellant at 50% and the negligence of the truck driver at 50%.

7. The next question is determination of the amount of compensation.

Ex.41 indicates the different injuries sustained by the appellant, which are described as under:

- i. C.L.W. Bleeding + (stitches taken) Horizontal 4 cms. x 2 cms. Frontal part of right side of forehead.
- ii. C.L.W. Bleeding + Vertical (stitches taken) 6 cm. x 3 cms. Frontal part of forehead vertically extending from medial end of right eyebrow to frontal part of skull bone.
- iii. C.L.W. Blood Clot + Transverse 1 cm x 1/2 cm. Right leg (upper 1/3 c middle 1/3 junction).
- iv. C/o. Pain & swelling Right upper arm X-ray shows humerno of upper 1/3 Rt. upper arm fracture at the junction with middle.
- v. C.L.W. Bleeding + (stitches taken) 1 1/2 cms. x 1/2 cm. Upper & inner aspeat of left thigh.
- vi. C/o. Pain & swelling Right Hand. X-Ray shows multiple factures. (1) fracture of 4th metacapul bone (2) fracture of 5th metacapul bone (3) fracture of proximal phalanx of thumb in the middle (4) proximal end of 11th phalanx of middle finger (5) fracture of 2nd (middle) phalanx of

only Rs.10,000/- is to be awarded to the appellant.

12. In the result, this Appeal is partly allowed.

The respondents including respondent No.3 - Insurance Company are directed to deposit before the Tribunal, within two months from today, a sum of Rs.10,000/- with running interest at the rate of 12% per annum from the date of filing of the claim petition till the date of deposit with proportionate costs. The respondents shall bear their own costs throughout.

Upon the amount being deposited by the Insurance Company, the Tribunal shall permit the appellant to withdraw the amount by an account payee cheque informing the appellant personally about the amount being paid over to the appellant.

(KMG Thilake)

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