IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 435 of 2014

[On note for speaking to minutes of order dated 18/04/2022 in R/FA/435/2014]

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NATIONAL INSURANCE CO LTD

Versus

RAJEEN RAFIQAHMED VOHRA & 4 other(s)

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Appearance:
MR DAKSHESH MEHTA(2430) for the Appellant(s) No. 1
MR AMIT C NANAVATI(1384) for the Defendant(s) No. 1
MR ANKUR Y OZA(2821) for the Defendant(s) No. 4,5
RULE SERVED for the Defendant(s) No. 2,3

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CORAM:**HONOURABLE MR. JUSTICE SANDEEP N. BHATT**

Date : 06/05/2022

ORAL ORDER

Considering the note for speaking to minutes filed by Mr. Dekshesh Mehta, learned advocate for the appellant, the same is allowed and is disposed off accordingly.

The order dated 18.04.2022 is recalled, corrected and replaced as under.

(1) The present appeal is preferred by the Insurance Company being aggrieved and dissatisfied with the judgment and award passed by Motor Accident Claims Tribunal (Auxiliary), Kheda Nadiad in Motor Accident Claim Petition No. 1055 of 2005, by which the Tribunal has awarded Rs.65,200/- with 7.5% interest p.a. from the date of claim petition.

(2) The brief facts of the case are such that, on 11.01.2005 claimant – Rajeen Rafiqahmed Vohra was travelling on Hero Honda motorcycle bearing registration number GJ-7-AK-6078, as pillion rider and the same was being driven by present opponent No.2 in the rash and negligent manner and excessive speed. When they reached near the place of accident, at that point of time, one Tempo bearing registration No. GJ-15-X-1352, which was driven by present opponent No.4 rashly and negligently and in excessive speed, dashed with the Hero Honda motorcycle. Due to said accident, original claimant has sustained serious injuries including fracture. Therefore, the claim petition is preferred to get the compensation of Rs.3 lakhs.

(2.1) The summons were served upon the Opponent Nos.1 and 2 chose not to remain present before the Tribunal. Opponent No.3 – Insurance Company appeared through its Advocates and filed written statement at Exh. 50 and denied the facts of the claim in *toto*. Opponent Nos. 4 & 5 appeared through their Advocates but have not filed written statement.

(2.3) The Tribunal has framed issues for determination and has recorded evidence. Affidavit is filed by the claimant at Exh. 41 and claimant has also produced documentary evidence like copy of F.I.R at Exh.57, copy of charge-sheet at Exh. 60 and Panchnama of the scene of offense at Exh. 52 and also produced disability certificate at Exh.56. The Insurance Company and the Advocate for the claimant has filed Pursis at Exh. 44 and agreed to consider the disability up to 10% which was assessed by the doctor as 8% and accordingly, the Tribunal has considered the amount of compensation Rs.65,200/- with 7.5% interest p.a. from the date of claim petition.

(2.4) Therefore, the present appeal by the Insurance Company before this Court.

(3) Learned Advocate Mr. Vrushank Mehta for learned Advocate Mr. Dakshesh Mehta appearing for the Insurance Company has submitted that the negligence of the Tempo driver is required to be held as 100% as charge-sheet is filed against the driver of tempo but the Tribunal has not considered that aspect. He has submitted that the negligence attributed to the driver of motorcycle is 20% though it is categorically mentioned in the FIR at Exh. 57, Panchnama at Exh. 52 and charge-sheet at Exh. 60 that he is more negligent. He has further drawn attention that Insurance Company of the Tempo was not joined as party, therefore, it may be presumed that tempo might be uninsured on the date of accident. He has further submitted that disability, which is considered by the Tribunal to the tune of 10% body as a whole is also erroneous, therefore, he prays that present appeal is required to be allowed as the Tribunal has committed material errors in considering the documentary evidence available on record while considering the aspect of negligence.

(4) *Per contra,* learned Advocate Mr. Amit C Nanavati appearing for the respondent No.1 and learned Advocate Mr. Ankur Oza appearing for the respondent Nos. 4 to 5 have submitted that the Tribunal has not committed any error in considering the amount of compensation nor committed any error in considering the aspect of negligence in its judgment. The FIR and Panchnama are considered by the Tribunal in correct manner and from the discussion, which is reflected from Para 8 of the judgment that the width of the road was 11 feet and it was single track road with no divider and it appears from the Panchnama that immediately prior to the accident, none of the driver of the tempo and

motorcycle had applied brakes to avoid accident, therefore, the Tribunal has rightly considered the negligence part of the tempo driver to the tune of 80% and negligence of the motorcycle to the tune of 20%. They have also pointed out that the aspect of income is rightly considered by the Tribunal and the Tribunal has devoted much space for the discussion of issue No.3, which pertains to liability of opponent No.3 – Insurance Company to pay the entire amount of compensation as the claimant is entitled to recover the amount of compensation from any of the parties. The Tribunal has given sufficient reasons, moreover, both the learned Advocates Mr. Oza as well as Mr. Nanavati have submitted that the amount which is challenged in the present appeal is Rs.65,200/- only and looking to the smallness of the amount, the appeal is required to be dismissed.

(5) I have considered the rival submissions of the parties. I have also considered the aspect of the negligence from the Panchnama drawn of the scene of offense. It clearly reveals that none of the drivers had applied brakes and the road having the width of 11 feet only there is no divider, therefore, considering the position of the vehicle and also considering the FIR, the Tribunal has rightly found that the negligence of Tempo is 80% and negligence of Motorcycle is 20%. Moreover, with regard to the liability aspect, which is considered by the Tribunal by holding the Insurance Company to pay the entire amount, is also found just and proper in the circumstances of the case and more particularly the claimant is pillion rider and is a third party to both of the vehicles and he can recover the amount from any of the tortfeasors. Therefore, the direction given by the Insurance Company to pay the amount jointly and severely to the claimant is found just and proper. In view of the decision of the Hon'ble Apex Court in the case of **Khenyei versus New Indian**

Assurance Co. Ltd., reported in **(2015) 9 SCC 273**, it would be open for the Insurance Company to recover 20% of the amount from the owner of the bike. It is also found that other directions given in Para 12 of the impugned judgment and award is also just and proper and in accordance with law. Moreover, it is needless to say that Insurance Company is unnecessarily filing such appeal for the small amount like Rs.65,200/- in such glaring facts and circumstances of the case. Therefore, on the smallness of the amount also, the appeal is required to be dismissed and accordingly.

(6) For the reasons recorded above, the following order is passed.

(6.1) The present appeal is dismissed, with no order as to costs.

(6.2) The amount lying in the FDR and/or with the Tribunal with accrued interest if any, shall be disbursed to the claimant after following due procedure, by account payee cheque, after verification.

(7) The record and proceedings be sent back to the concerned Tribunal forthwith.

(SANDEEP N. BHATT,J)

M.H. DAVE