

(2014) 03 KL CK 0058
In the High Court Of Kerala
Case No : R.F.A. No. 38 of 2004

Anitha

APPELLANT

Vs

Kerala State Electricity Board

RESPONDENT

Date of Decision : 14-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 33, Order 41 Rule 33, 107(2)
Constitution of India, 1950 — Article 39A
Evidence Act, 1872 — Section 120, 3, 60
Fatal Accidents Act, 1855 — Section 1, 1A, 2
Motor Vehicles Act, 1988 — Section 163A, 166, 168

Citation : (2014) 4 ACC 297 : (2015) ACJ 951 : (2014) 3 ILR 182 : (2014) 2 KHC 114 : (2014) 2 KLJ 180 : (2014) 2 KLT 50

Hon'ble Judges : T.B. Radhakrishnan, J;A. Muhamed Mustaque, J

Bench : Division Bench

Advocate : Kaleeswaram Raj, Advocate for the Appellant; P. Santhalingam, Sr. Advocate, Pulikool Aboobacker and Viju Thomas, Government Pleader, Advocate for the Respondent

Final Decision : Allowed

Judgement

A. Muhamed Mustaque, J.—This appeal is for enhancement of compensation at the instance of legal heirs of Balachandran who died in an electrocution on 7.8.1998. His widow, two minor children and mother are the plaintiffs. The court below awarded a compensation of Rs. 88,000/- as against the claim of Rs. 3,00,000/-. The question of liability imposed by the impugned judgment has not been contested by the Kerala State Electricity Board, hereinafter referred to as the "Board", by filing an appeal. The deceased Balachandran was a vegetable vendor. His widow testified that he was having an income of Rs. 6000/- per month from the sale of vegetables. He was aged 40 at the time of electrocution. The court below did not rely upon the oral testimony of the widow as to the monthly income of Balchandran and for want of any other documentary proof, assessed the compensation at Rs. 88,000/-. In that exercise of working out the compensation, the court below did not assign any reason for calculating

compensation at Rs. 88,000/-.

2. Before us, the learned counsel for the appellants Shri Kaleeswaram Raj addressed this appeal on two grounds. One is regarding the inadequacy of the compensation. According to him, the court below went wrong in not accepting the oral evidence of the widow, who is a competent witness to depose on the income of the husband. He also refers to the report of the District Collector submitted before the court below in an enquiry under Order XXXIII of the CPC for proof of income. According to the learned counsel, the court below cannot expect a small vendor like Balachandran to have an income tax certificate to prove his income. The other ground on which he assails the decree is for restricting the interest awarded in the suit from the date of suit. The learned counsel submits that the plaintiffs are entitled to compensation with interest from the date of accident.

3. We have also heard the learned counsel for the Board, who supported the judgment and submitted that the compensation amount awarded by the court below is based on available evidence with regard to income.

4. The first point in question is or rather was, whether the oral evidence of the widow as to the income of her deceased husband is sufficient or not. There is no dispute for the Board in the written statement as to the fact that Balachandran was a vegetable vendor. However, the Board disputed the allegation that the deceased was earning Rs. 6,000/- per month. Apart from the oral evidence of P.W. 1, the widow of Balachandran, there was no other evidence to establish the income of the deceased. But, it is pertinent to note that the challenge in the cross examination of P.W. 1 was only with respect to the non-production of proof for running the vegetable shop by the deceased and there was no cross examination regarding her assertion as to the income of the deceased. The fact of running the vegetable shop, having been admitted in the written statement, want of proof as to the running of the shop is inconsequential. Thus, the oral testimony of P.W. 1 as to the income remains unchallenged. The court below proceeded to decide the point on income as though the oral evidence on the income of the deceased husband as deposed by the widow has no relevance in law. If a fact needs to be proved by oral evidence, it must be direct, that is to say, the person, who speaks about a fact must have seen it with his own eyes or heard it with his own ears, S. 60 of the Evidence Act recognizes proof of fact which could be heard by a witness, who says, he heard it. S. 120 of the Evidence Act declares that in all civil proceedings, the husband and wife of any party to the suit shall be competent witness. In this context, "competent witness" could only mean that witness is capable to speak on those facts, she or he knows personally about the husband or wife as the case may be. The court below should have found that in the normal nature of human conduct, husband would confide about his income with the wife and the evidence of such wife need not be discarded unless its non-existence is more probable with reference to other relevant facts. The documentary evidence if remains wanting, that does not lead

to a conclusion that the oral evidence should be eschewed from consideration. A fact is said to be proved or disproved in terms of the definition accorded under S. 3 of the Evidence Act, when court places itself in the place of prudent man and believes under the circumstances of a particular case, it exists or doesn't exist or considers its existence or non-existence as so probable. A poor or marginalised vendor of vegetable cannot expect to have record of his income. In that probability, courts should only believe that documentary evidence does not exist instead of expecting its existence. The court below, in the process of appreciating the evidence, did not analyse the circumstances of the case or the nature of the documentary evidence that could have probably let in, considering the nature of business conducted by the deceased Balachandran. Such appreciation of circumstances is essential while finding a "fact" said to be proved or disproved. On a review of the evidence as a whole, we find that the oral evidence of P.W. 1, in the circumstances of the case, is the best evidence. We, though find that there is no effective cross examination as to the assertion of P.W. 1 to the effect that the deceased was having an income of Rs. 6,000/- per month, we feel Rs. 3,000/- can be fixed as monthly income. We do not propose to rely on the enquiry report filed by the District Collector under Order XXXIII of the CPC as the same was not received in evidence before the court below.

5. Onto the question of compensation, what should be the compensation for death on account of electrocution which is coming under the Fatal Accidents Act? What are factors need to be taken into account while determining the compensation? We find the court below merely made a guess work while assessing the compensation at Rs. 88,000/-. Determination of compensation often perplexed the courts, as the yardsticks for determination of compensation vary with societal conditions and encountered with many imponderables. Fatal Accidents Act, 1885, hereinafter referred to as the "Fatal Act", modelled on English Fatal Accidents Act 1846, was the first Indian legislation to recognize the rights of families to claim compensation for loss occasioned by the death of a person caused by actionable wrong. S. 1A of Fatal Act stipulates that court may give damages as it may think "proportionate" to the loss resulting from such death. In the recent judgment in Puttamma and Others Vs. K.L. Narayana Reddy and Another, , the Hon"ble Supreme Court, after adverting to the history of fatal accidents law in India, has succinctly laid down the difference between compensation payable the under Fatal Accidents Act in English law and the Motor Vehicle Acts in India, see paragraph 16 which is quoted hereinbelow:

16. Thus according to the English Law compensation/damages were payable according to the proportionate loss whereas in India compensation is payable which appears to the Tribunal to be just is payable. The approach of the Courts according to the English Law and according to the Indian Law have to be distinct and separate. Indian Law recognizes just compensation whereas English Law required compensation proportionate to the loss suffered. English Courts have been calculating loss of money as a bargain as to how much monetary loss has been caused to the claimant, as a result the death of bread earner/deceased.

The English Law being different, English Judges were having different approach towards the grant of compensation to the deceased's family.

Section 168 of Motor Vehicles Act 1988, (hereinafter referred to as the "Act 1988"), mandates the Motor Accident Claims Tribunal to determine the compensation which appears to be "Just". The "proportionate loss" is the key in the assessment of the loss of dependency under S. 1A of Fatal Act in India. Under Act 1988, the legal representatives under S. 166 or the legal heirs under S. 163A of the deceased are entitled to compensation and they need not establish that they are dependants. However, in cases coming under the Fatal Act, the onus is on the plaintiff to plead and establish, the extent of loss being dependant. It further restricts the class of such dependants to wife, husband, parent and child. There are two types of loss, one is proportionate loss to the dependant as contemplated under S. 1A and the other is loss to estate as provided under S. 2. The plaintiff has to establish the proportionate loss by proving pecuniary loss in a claim based on dependency under S. 1A. In respect of the claim under S. 2, the plaintiff need not establish any loss to them. Fundamental difference between claim under Sections 1A and 2 is that in former, the liability arises on account of death to the dependants and in latter liability arises on account of wrongful act to the deceased, which would have been recoverable by him, had he been alive. "The damages claimable under this head for the pecuniary loss do not arise on account of death or as a consequence of the death of the deceased but, due to pecuniary loss resulting from wrongful act, neglect or default and as a consequence of such act or default. As such, loss of personal assets belonging to the deceased and loss of earning prior to and upto the moment of death must be included in the item of losses to the estate" (See page 132 of R.N. Dwivedi's "The Fatal Accident Act" third edition). Loss of expectation of life, mental agony, medical expenses, funeral expenses etc. are some of the losses that can be classified as loss to the estate of deceased. If any part of the compensation under the loss of estate goes to dependant under the claim of personal loss, to the extent of such credit, loss under personal loss should be deducted. In Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others, it is stated by the Hon"ble Supreme Court as follows:

12. The law on this branch of the subject may be briefly stated thus: The rights of action under Ss. 1 and 2 of the Act are quite distinct and independent. If a person taking benefit under both the sections is the same, he cannot be permitted to recover twice over for the same loss. In awarding damages under both the heads, there shall not be duplication of the same claim, that is, if any part of the compensation representing the loss to the estate goes into the calculation of the personal loss under S. 1 of the Act, that portion shall be excluded in giving compensation under S. 2 and vice versa.

6. Once the plaintiffs establish that they are dependent on the deceased, they are entitled to compensation based on proportionate loss. What should be the criteria to establish proportionate loss of dependant? In case of death or

permanent disability, multiplier method is followed by the Tribunal for determining just compensation. We are posed with the question as to adopting the multiplier method for assessment of compensation in fatal accidents. We find the present multiplier method followed in the Motor accident cases in India had its origin in the decisions under the Fatal Accidents. Act in English Courts.

7. In *Davies and another V. Powell Duffryn Associated Collieries Ltd.* ((1942) 1 All. E.R. 657 (H.L.)) House of Lords through Lord Wright states the general principle of assessment of loss under English Fatal Accidents Act as follows:

The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be termed into a lumpsum by taking a certain number of years' purchase.

In *Mallet v. Mc Monagle* (1969 ACJ 312 (H.L.)) Lord Diplock stated the object of compensation under the Fatal Act, thus:

My Lords, the purpose of an award of damages, under the Fatal Accidents Act is to provide the widow and other dependants of the deceased with a capital sum which with prudent management will be sufficient to supply them with material benefits of the same standard and duration as would have been provided for them out of the earnings of the deceased had he not been killed by the tortious act of the respondents.....

In *Mallet's* case (*supra*) House of Lords through Lord Diplock laid down the following principles for the purpose of working out the annual dependency under the Fatal Act:

To assess the damages it is necessary to form a view on three matters each of which is in greater or less degree one of speculation--

(i) the value of the material benefits for his dependants which the deceased would have provided out of his earnings for each year in the future during which he would have provided them had he not been killed,

(ii) the value of any material benefits which the dependants will be able to obtain in each such year from sources (other than insurance) which would not have been available to them had the deceased lived but which will become available to them as a result of his death,

(iii) the amount of the capital sum which with prudent management will produce annual amounts equal to the difference between (i) and (ii) (i.e., "the dependency") for each of the years during which the deceased would have provided material benefits for the dependants had he not been killed.

In *Taylor v. O'Conner* ((1970) 1 All.E.R. 365), Lord Reid held,-

Damages to make good loss of dependency over a period of years must be awarded as a lump sum, and that sum is generally calculated by applying a multiplier to the amount of one years" dependency. That is perfectly a good method in the ordinary case, but it conceals the fact that there are two quite separate matters involved - the present value of the series of future payments, and the discounting of that present value to allow for the fact that, for one reason or another, the person receiving the damages might never have enjoyed the whole benefit of dependency. It is quite unnecessary in the ordinary case to deal with these matters separately, Judges and counsel have a wealth of experience which is an adequate guide to the selection of the multiplier and any expert evidence is rightly discouraged.

The Full Bench of Andhra Pradesh High Court in *Polavarapu Somrajyam v. A.P.S.R.T.C.* (1984 ACJ 18 (A.P.)) explained principles of multiplier in Indian context,-

1. The age of the deceased and of the dependants or legal representatives, whichever is of the shorter period; 2. the period of dependency; 3. the number of dependants or legal representatives to be maintained from out of the amount to be determined; 4. the status and comforts enjoyed before the date of accident; 5. the minimum comforts required; 6. whether the amount to be awarded would be sufficient to meet the period of dependency; 7. education and upbringing of children in case the deceased was the bread-winner of family; 8. marriage expenses of the daughters; and 9. the peculiar facts of the case and other analogous or relevant facts to be taken into consideration to decide what number of years multiplier has to be applied.

In *Madhya Pradesh State Road Transport Corpn., Bairagarh Vs. Sudhakar etc.*, in a case coming under the Motor Vehicles Act, the Hon"ble Supreme Court held as follows:

A method of assessing damages usually followed in England, as appears from *Mallet v. McMonagle* is to calculate the net pecuniary loss upon an annual basis and to arrive at the total award by multiplying the figure assessed as the amount of the annual "dependency" by a number of "year"s purchase", that is, the number of years the benefit was expected to last, taking into consideration the imponderable factors in fixing either the multiplier or the multiplicand.....

In *Bhagwandas Vs. Mohd. Arif*, , Justice Jagannadha Rao (as he then was) drawn out a scientific method of calculation of multiplier after referring to various methods prevailing in determining the compensation. In that judgment, the learned Judge referred to the various methods prevailing in various countries for calculating compensation and held as follows:

There are at least three methods of computing loss of future earnings: (a) Interest Method; (b) Lump sum Method; and (c) Multiplier Method. The first and the second are now replaced by the Third. The multipliers are of two types, (a) Traditional Multiplier and (b) Actuary"s Multiplier. The "Judge"s traditional

multiplier" is based on pure experience and practice. The Actuary's multiplier takes care of future uncertainties of life and there is also no need to deduct anything for lump sum (or accelerated payment) if the Actuary's multiplier is applied. Further, there is the additional advantage of avoiding expert evidence of Economists in each case, as to the rate of increase of inflation and the current rates of interest on securities. That is why the Actuary's multiplier based on the Diplock method is now scientifically accepted as the best and also the simplest method for computing future loss of earnings. (paras. 12, 17, 41)

8. The Hon'ble Supreme Court in *General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others*, after referring to *Dovies'* case (supra) and *Mallet's* case (supra) evolved multiplier methods to be followed by the Motor Accident Tribunal and stated as follows at paragraph 13:

The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last.

And it was further held that "the multiplier method is logically sound and legally well-established".

9. The object of working out proportionate loss under the Fatal Act is to calculate pecuniary loss suffered by each dependant as a result of death. Multiplier method based in *Davies'* case (supra) and *Mallet's* case (supra) is approved in *Susamma's* case (supra) for assessment of loss of dependency.

10. In *Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another*, the Hon'ble Supreme Court devised multiplier method based on decisions in *U.P. State Road Transport Corporation and Others Vs. Trilok Chandra and Others*, and *New India Assurance Co. Ltd. v. Charlie & Anr.* (2005 (3) KLT 227 (SC) : (2005) 10 SCC 720) as follows:

42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying *Susamma Thomas*, *Trilok Chandra* and *Charlie*), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years.

The standardised determinants of multiplicand is also explained in the above

judgment in paragraph 19 as follows:

Step 1 (Ascertaining the multiplicand)

The income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependent family, constitutes the multiplicand.

Sarla Verma" case (supra) also laid down principles relating to calculation of income taking into account future prospects, deduction for personal and living expenses and computation of compensation. The Hon"ble Supreme Court in Puttamma"s case (supra) held that Second Schedule under S. 163A of Act 1988 has become redundant. Thus we find, to determine the compensation on account of the loss of dependency under S. 1A of the Fatal Act, guidelines formulated in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, can be followed.

11. In the Indian context, the real problem arises as to calculation of loss of estate to deceased when there is duplication or overlapping of compensation claimed under Sections 1A and 2 of the Fatal Act. If a pecuniary benefit is derived by the dependant referable under S. 1A on account of the death of the deceased, the same has to be deducted from the compensation payable under S. 1A. In Davies case (supra), House of Lord states calculation of net compensation payable under the English law as follows:

It was common ground that, except where there is express statutory direction to the contrary, the damages to be awarded to a dependant of a deceased person under the Fatal Accidents Acts must take into account any pecuniary benefit accruing to that dependant in consequence of the death of the deceased. It is the net loss on balance which constitutes the measures of damages.

In Davies" case (supra), the main point for decision was whether "must" damages recoverable under Law Reforms Act be taken into account or not for assessing the damages under the English Fatal Accidents Act. Under English law, there are other statutory provisions to exclude the sum paid or pay able on the death of the deceased under the contract of Insurance from assessment compensation. House of Lords in that context held in Davies" case (supra) that the rights conferred under the Law Reforms Act, to that extent, are tautological. In the absence of similar statutory provisions in India, it may not be possible to exclude the sum paid or payable to the dependant on account of the death of the deceased from the assessment of loss under S. 1A (see judgment of the Hon"ble Supreme Court in Gobald Motor Service Ltd."s case (supra). Therein, regarding the assessment of loss of estate, dealing with a fatal accident case, it was held as follows:

.....the pecuniary loss can be ascertained only by balancing on the one hand

the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained.

12. In *Helen C. Rebello & Ors. v. Maharashtra State Road Transport Corporation* (1999 ACT 10) a question arose as to deduction of life insurance money of the deceased from the compensation payable under the Motor Vehicles Act. The Hon'ble Supreme Court noted the difference between the compensation payable under the Fatal Act and the compensation payable under the Motor Vehicles Act and held that in determining "just" compensation under Motor Vehicles Act, common law principles of balancing of loss and gain of the claimant occasioned by the death has no application. After advertng to *Flemming on Torts*, it was further held that the compensation payable under the Motor Vehicles Act is statutory and the life insurance amount payable is under the contract of Insurance. We also feel such contractual benefits also need to be excluded while calculating pecuniary benefits under the Fatal Act in India. Since we are not called upon to decide that issue in this case, we leave it open to be decided on facts of appropriate case. We have adverted to the above, though we are not called upon to decide on any question on deduction in this case, as the Board had not raised any question on deduction in the written statement, for the reason that we feel that the Fatal Act needs to undergo vast changes to bring in tune with the time, as otherwise, the wrongdoer may flee with the liability of compensation. The assessment of compensation under the Fatal Accidents Act in English law has undergone vast changes" to exclude the benefits received by the dependant on account of the death of the deceased. However, the Fatal Act in India remains stigmatically archaic and poignantly doomed on hapless victims.

13. In the light of the discussions as above, we calculate the compensation payable to the plaintiffs as follows:

Monthly income Rs. 3000/-; Deduction of 1/5th based on paragraph 30 of *Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another*, (where the number of dependent family members is 4 to 6) = 2400; Multiplier 15 based on paragraph 42 of *Sarla Verma's* case (deceased was aged 40 at the time of accident)

Total compensation = $2400 \times 12 \times 15$ = Rs. 4,32,000/-.

In the plaint, the plaintiffs did not claim any amount under the head of loss of estate. Therefore, we do not propose to award any compensation to the plaintiffs under this head. Though, the plaintiffs claimed a compensation of Rs. 7,00,000/- in the plaint, they have restricted their claim to Rs. 3,00,000/-. We feel, the plaintiffs are entitled for full compensation as the restriction of amount in the plaint due to inability to pay court fee, does not amount to waiver. Payment of court fee is a matter between the State and the plaintiff. Therefore, the plea of waiver may not be available to the defendant. We have also another reason to

allow the plaintiffs to claim full compensation. In the report filed by the learned Government Pleader, in an enquiry under Order XXXIII of the CPC seeking exemption of court fee, it is stated that the income of the first plaintiff is Rs. 30,600/- per annum. It is acting upon such report that the plaintiffs were not allowed to sue as indigents. We are sure, with that income in hand, the plaintiffs would not have been able to pay the full court fee that is leviable on Rs. 4,32,000/- (Rupees four lakh thirty-two thousand only). In this context, it is appropriate to quote Granville Austin in his famous book "working a democratic constitution, a history of Indian experience".

Seeking justice in court was expensive for the common man, often prohibitively so. Two reasons were the cost of a lawyer, and the existence of the fee system under which a litigant had to pay a fee to register his case. This had to be changed, the Law Commission said, pointing out that India was the only country under a modern system of government that "deters a person who has been deprived of his property or whose legal rights have been infringed from seeking redress by imposing a tax on the remedy he seeks".

Article 39A of Constitution of India must be read in the light of the observation made as above by Austin. We are afraid, if we fail to grant full compensation, we would be denuding the rights of the poor, who have placed hope in the administration of justice by Courts, in terms of the scheme under Art. 39A. We are also armed with the judgments of the Hon'ble Supreme Court in granting full compensation without full court fee being paid in the plaint or appeal. The Supreme Court in Bhag Singh and Others Vs. Union Territory of Chandigarh through the land acquisition collector, Chandigarh, and in Chandrashekhar v. Addl. Special Land Acquisition Officer (2009 (3) KLT Suppl. 454 (SC) : 2009 SAR (Civil) 693) held that the technical ground of non-payment of court fee shall not stand in the way of awarding full compensation to the rightful claimant. Therefore, invoking our power under S. 107(2) read with Order XLI R. 33 of the Code of Civil Procedure, we deem it appropriate to order that the court fee payable on Rs. 4,32,000/- on plaint and on appeal can be levied in this appeal at this stage for granting full compensation. Regarding the rate of interest, we feel the rate of interest awarded by the court below is excessive. We find that interest at the rate of 9 percent will be sufficient. Since we are allowing the plaintiffs to pay court fee at this stage, the plaintiffs are allowed to recover interest from the date of accident i.e., 7.8.1998. Considering the circumstances of the plaintiffs, we feel the defendants can be directed to pay the court fee. We are also supported for such direction, by the decision of this court in Joseph Vs. Kerala State Electricity Board, .

In the result this appeal is allowed as follows:

The plaintiffs are entitled to compensation for a sum of Rs. 4,32,000/- together with interest @ 9% from 7.8.1998. The plaintiffs are also entitled to costs from the defendant bereft of component of court fee being paid by the defendants based on this judgment. Amount paid, if any, by the defendants, based on the

decree of the court below, shall be adjusted against the principal amount. The plaintiffs are directed to file a statement on the court fee leviable on the plaint and the appeal memorandum within a week from today. The decree shall be drawn on approval of the court fee payable, based on this judgment. The defendants shall pay the court fee payable notified by the Registry to this Court within a period two months from the date of receipt of a copy of this judgment. Court fee to be paid by the defendants shall be adjusted against the costs.