

(1993) 09 KL CK 0040
In the High Court Of Kerala
Case No : M.F.A. No. 625 of 1984

Anuradha Varma and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 13-09-1993

Acts Referred:

Succession Act, 1925 — Section 306

Citation : (1994) ACJ 353 : (1993) 1 ILR (Ker) 640

Hon'ble Judges : T.L. Viswanatha Iyer, J;P. Krishnamoorthy, J

Bench : Division Bench

Advocate : V. Chitambareh, for the Appellant; A.K. Madhavan Unni and M.A. Kader Kunju, G.P., for the Respondent

Judgement

P. Krishnamoorthy, J.—Appellants are the wife and children of one Santharam Varma who died during the pendency of the proceedings before the Motor Accidents Claims Tribunal. Deceased Santharam Varma, while he was travelling from Palghat to Kollengode on his motor cycle, was hit by a jeep coming from the opposite side having registration No. KRT 9695 and belonging to the Sales Tax Department of the Kerala Government, at 7 p.m. on 28.3.1979. The accident occurred at a place called Kachipode. He sustained injuries and it was due to the rash and negligent driving by the driver of the jeep. Immediately after the accident he fell down and became unconscious. He was taken to the hospital where he was under treatment for nearly a month. It is alleged that even thereafter he had to continue his treatment for another three months, though actually he was not an inpatient in the hospital. Accordingly, he claimed Rs. 1,40,000/- as compensation from the State, made up of Rs. 1,00,000/-towards loss of earnings, Rs. 10,000/- for medical expenses for treatment, Rs. 25,000 for pain and suffering and Rs. 5,000/-towards damages to the motor cycle.

2. The respondent State filed an objection contending that there was no negligence on the part of the driver of the jeep and as such it is not liable. It was also contended that the claimant having compounded the offence with the driver

of the jeep before the criminal court is not entitled to any compensation. It was further contended that the non-impleadment of the driver is fatal to the maintainability of the petition.

3. During the pendency of the proceedings the original claimant died in 1983 and the appellants who are the wife and children were impleaded as the legal representatives.

4. On the basis of the evidence adduced in the case the Tribunal came to the conclusion that the accident occurred due to the negligent driving of the jeep by its driver. It was also found that it is not necessary to implead the driver in the petition as the liability of the owner and the driver is joint and several and any claimant is entitled to sue any one of them for the relief. Ultimately the Tribunal granted a compensation of Rs. 13,000/-, made up of Rs. 9,600/- for loss of earnings, Rs. 2,000/- for medical expenses and Rs. 1,400/- towards damages to the motor cycle. As stated earlier, the original claimant died during the pendency of the proceedings before the Motor Accidents Claims Tribunal and on a concession made by counsel it was held by the Tribunal that no compensation is payable under the head "pain and suffering" as the cause of action will not survive. Dissatisfied with the amount awarded by the Tribunal the claimants have filed this appeal.

5. It was contended by counsel for the appellants that the concession made by counsel before the lower court regarding the claim towards pain and suffering is not binding on the appellants. It was contended by him that by virtue of Sections 2 and 9 of the Kerala Torts (Miscellaneous Provisions) Act, 1977, even such causes of action will survive especially when Section 306 of the Indian Succession Act is repealed so far as the Kerala State is concerned. He also contended that the amounts awarded under the other heads are also low. On the other hand, the learned Government Pleader contended that the application itself is not maintainable for non-impleadment of the driver and that there is no evidence to show that there was any negligence on the part of the driver.

6. On the plea taken by the learned Government Pleader that there was no negligence on the part of the driver, we are afraid that the State is not entitled to raise that contention without filing a separate appeal against the award already passed by the M.A.C.T. It was found by the Tribunal that the driver of the vehicle was negligent and accordingly an award was also passed. Without challenging that award by a separate appeal it is not permissible for the State to now contend that there was no negligence on the part of the driver.

7. Regarding the second contention by the State that the driver is a necessary party, it has to be held that there is no merit in that contention. In torts the liability of the joint tortfeasors is joint and several. In other words, the liability of the owner and the driver of the vehicle is joint and several and any person who suffers damages is entitled to sue any one of them. May be the person against whom an award is passed and who has paid the amount is entitled to

contribution from the other joint tortfeasor. That does not prevent or disentitle a claimant from suing one of the joint tortfeasors. This view has been expressed by two Division Bench decisions of this court reported in *United India Fire and General Insurance Co. Ltd. Vs. Varghese and Others*, and *United India Insurance Co. Ltd. Vs. Ratnamma and Others*. In the latter case it was observed:

The owner and driver are joint tortfeasors and, therefore, absence of one of them will not be a bar for a suit for compensation. This does not mean that the negligence of the driver need not be proved. Even in the absence of the driver evidence regarding the negligence of the driver can be adduced. Take, for example, a case where the driver also dies in the accident without leaving any legal representative. That will not preclude the injured from claiming compensation against the owner or the insurer. The owner and driver are joint tortfeasors, whose liability is joint and several. Each may be sued alone or jointly and each will be liable for the whole damage.

Further, from the provisions contained in Section 7 of the Kerala Torts (Miscellaneous Provisions) Act, 1977, it is clear that a suit against one of the joint tortfeasors alone is maintainable, for that section provides that the other joint tortfeasor will be entitled to contribution from the tortfeasor who was not a party to the proceeding. The section also provides that the filing of a suit or other proceeding against one of the joint tortfeasors will not be a bar for the claimant for filing another claim or suit against the other tortfeasor. From this provision also it is clear that a claimant is entitled to sue one of the joint tortfeasors for relief without impleading the other joint tortfeasor. Rule 6 of the Kerala Motor Accidents Claims Tribunal Rules, 1977, does not make it obligatory on the part of a claimant to make the driver also a party to the proceedings. That rule only provides that the Claims Tribunal shall send notice to the owner and the driver of the motor vehicle along with copy of the application. If the name of the driver is available, the Tribunal is enjoined to send notice to him also. This does not mean that an application without impleading the driver is not maintainable. In that view of the matter, we overrule the second contention raised by the Government Pleader as well.

8. Coming to the merits of the case, we do not think that any interference is called for in regard to the award of the M.A.C.T. except in regard to pain and suffering for which no compensation was awarded by the Tribunal. As stated earlier, the Tribunal rejected the same on the basis of the concession made by the advocate that on the death of the original claimant Santharam Varma that claim abates and the legal representatives are not entitled to claim the same. In the light of Section 2 of the Kerala Torts (Miscellaneous Provisions) Act, 1977, even such claims survive the death of the injured. By Section 9 of the aforementioned Act, Section 306 of the Indian Succession Act, 1925, so far as it relates to light of action in torts, shall cease to apply to the State of Kerala. Accordingly the legal representatives are entitled to initiate an action for such damages or to proceed with the claim already made by the injured. It is well

settled that a concession by the advocate on a question of law is not binding on the parties and they are entitled to challenge the same in appeal.

9. It has come out in evidence that the claimant was in the hospital for nearly a month and that he had to undergo treatment for another three months even after discharge from the hospital. He had a fracture of his leg and even after operation and treatment it was shortened by 1 1/2 inches. He would certainly have suffered a lot of pain and suffering which in the circumstances of the case we quantify at Rs. 10,000/-. The appellants-claimants will be entitled to an additional amount of Rs. 10,000/- over and above the amount already awarded.

10. In the result, we allow the appeal in part and modify the award of the Tribunal by allowing a total amount of Rs. 23,000/- as compensation to the appellants together with interest at 12 per cent per annum from 28.9.1979 payable by the 1st respondent. The direction given by the Motor Accidents Claims Tribunal in regard to the share of minors will stand as such. There will be no order as to costs in this appeal.