

(1997) 08 OHC CK 0006
In the Orissa High Court
Case No : A.H.O. No. 53 of 1995

Divisional Manager, National Insurance Company Ltd.

APPELLANT

Vs

Jayashree Rath and Others

RESPONDENT

Date of Decision : 05-08-1997

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A
Motor Vehicles Act, 1988 — Section 110B, 168(1)

Citation : (1999) ACJ 889 : (1997) 2 OLR 343 : (1997) 2 OLR 342

Hon'ble Judges : S.C. Datta, J;A. Pasayat, J

Bench : Division Bench

Advocate : P. Roy, L. Dash and S. Roy, for the Appellant; Mahadev Mishra, S. Barik, Mamata Mishra and H.K. Agarwal (for respondent Nos. 1 to 5), for the Respondent

Judgement

A. Pasayat, J.—In this Letters Patent Appeal, National Insurance Company Ltd. (hereafter referred to as "insurer") has called in question legality of judgment passed by a learned Judge of this Court in Misc. Appeal No. 344 of 1992.

2. At the threshold it is necessary to take note of few relevant facts, which have contributed to the filing of this appeal.

On 27. 5.1987 one Sanjay Kumar Rath (hereinafter referred to as "deceased") lost his life in an automobile accident. A Premier Padmini Car bearing No. OAX 5166 was involved in the accident. The said vehicle was owned by P.V.L.N. Swamy, Branch Manager of Oriental Insurance Co. Ltd. (hereinafter referred to as "Swamy"). Legal representatives of deceased Sanjay lodged a claim u/s 110-A of the Motor Vehicles Act, 1939 (in short, "the "Act") claiming compensation of Rs. 19,26,000/-. Claims application was registered as M.A.C.T. Misc. Case No. 482 of 1987 and was disposed of by Third Motor Accident Claims Tribunal, Pun (hereinafter referred to as "Tribunal") awarding compensation of Rs. 7,20,000/-. In addition cost of Rs. 500/- was awarded. It was stipulated in the award that compensation amount shall carry interest " 6% per annum from the date of

claim i.e. 22.7.1987. A default rate of interest " 9% per annum was stipulated.

3. It is to be noted that in the written statement filed before the Tribunal, definite stand was that the deceased was a gratuitous passenger and insurer has no legal liability to pay compensation in respect of such a person. Swamy, owner of the vehicle was impleaded as opposite party No. 1 before the Tribunal. Though he did not file any written statement, he examined himself as O.P.W. 2. According to him, deceased was driving the car at the time of accident. This statement was made to contradict the assertion made in the claim petition to the effect that Swamy was driving the vehicle and Sanjay was sitting in the front seat of the car towards the left side. Tribunal recorded a conclusion that Swamy was driving the vehicle and deceased did not lose life on account of his own negligence, but on account of injuries sustained by him in the accident caused by Swamy's rash and negligent driving of the car. Tribunal rejected plea of insurer that deceased being a gratuitous passenger in the offending car, it had no liability to pay any compensation. The annual contribution was fixed at Rs. 36,000/- and applying multiplier of 20, compensation was assessed at Rs. 7,20,000/- as indicated above.

4. In the appeal u/s 110-D of the Act read with Section 173 of the Motor Vehicles Act, 1988 (described as "New Act"), it was contended that the crucial question was who was driving the vehicle. Great reliance was placed on evidence of Swamy who was examined as O.P.W. 2 to contend that deceased Sanjay was driving the vehicle. Claimants examined two witnesses to prove that Swamy was driving the vehicle. Learned Single Judge with reference to evidence of witnesses and materials on record concluded that Swamy was driving the vehicle and Sanjay was sitting to the left of Swamy. So far as plea relating to deceased being a gratuitous passenger, it was noticed that policy in question was not produced either before Tribunal or during hearing of Misc.Appeal. That being the position adverse inference was drawn. So far as quantum of compensation is concerned, taking into account decision of apex Court in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, , it was observed that appropriate multiplier would be 16. Worked out on that basis, loss of dependency was fixed at Rs. 5,76,000/-. Further a sum of Rs. 1,00,000/- was awarded towards loss of consortium and mental agony etc. Accordingly, total compensation was fixed at Rs. 7,76,000/-, which was directed to be paid with interest at the rate of 6% per annum from the date of claim within two months, with a stipulation that rate of interest would be " 9% if payment was not made within that time.

5. In support of present appeal, Mr. P. Roy, learned counsel for insurer has strenuously urged that learned Single Judge was not justified in drawing conclusion that Swamy was driving the vehicle, and not deceased. He also submitted that being a gratuitous passenger, no compensation was payable by insurer. Lastly, it was urged that quantum as fixed is not on the higher side. Mr. Mahadev Mishra, learned counsel for claimants supported the impugned

judgment.

6. So far as question as to who was driving the vehicle is concerned, we find that Swamy also sustained injuries on account of accident. Extent and area is available in Ext. 16. Ext. 14 is certified copy of post-mortem , report of deceased. The car had been damaged on its left side as is evident from Ext. 16. Had Swamy taken his seat on the left side of front side of the car as claimed, he would not have escaped with minor injuries, as is evident from injury report. Ext. 1. The car being admittedly a right hand drive vehicle, inevitable conclusion is that he was driving the vehicle. These aspects have been duly taken note of by learned Single Judge and we find no infirmity in the conclusion. Plea of insurer that deceased was driving the vehicle has no substance and is rejected.

7. Second question relates to liability, if any, of the insurer, on the plea of insurer that Sanjay was a gratuitous passenger. As has been noted by learned Single Judge, no attempt was made to produce policy by insurer either before Tribunal or during hearing before learned Single Judge. Same is the position so far as present appeal is concerned. Learned Single Judge has rightly drawn adverse inference. We find no reason to take a different view. The ratio of decision in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, has full application to facts of present case. It is submitted by learned counsel for insurer that at appellate stage, policy can be produced and considered as additional evidence. There can be no quarrel with that proposition generally. But it has to be explained as to why it was not produced earlier. That question is of academic interest in the present case as the policy has not seen light of the day either before Tribunal or this Court. No explanation whatsoever has been offered for its non-production. Insurer has been rightly held to be liable to indemnify compensation payable by owner of offending vehicle.

8. Residual question is whether quantum of compensation as fixed can be termed as just compensation. Undisputedly, deceased was aged about 35 years at the time of accident. Appropriate multipliers to be adopted in respect of persons belonging to different age and income groups have been discussed by apex Court in General Manager, Kerala State Road Transport Corporation's case (supra) and U.P. State Road Transport Corporation and Others Vs. Trilok Chandra and Others, .

9. The topic of compensation for causing death by negligent driving came up for serious discussion before apex Court in Gobald Motor Service Ltd. v. R.M.K. Veluswami 1958 ACJ 179 (SC). The apex Court referred to the House of Lords decision in Davies v. Powell Duffrvin Associated Collieries Ltd. (1942) AC 601 and quoted the following passage from the judgment :

"The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered. The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the

future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death".

10. The apex Court also referred to the judgment by Viscount Simon in *Nance v. British Columbia Electric Railway Co., Ltd.* (1951) AC 601, in which the same principles were enunciated for estimating the damages, the method adopted, however, differed. Various factors that would enter the calculation as per Viscount Simon were set out in the judgment as under :

"..... at first the deceased man's expectation of life has to be estimated having regard to his age, bodily health and the possibility of premature determination of his life by later accidents; secondly, the amount required for the future provision of his wife shall be estimated having regard to the amounts he used to spend on her during his lifetime, and other circumstances; thirdly, the estimated annual sum is multiplied by the number of years of the man's estimated span of life, and the said amount must be discounted so as to arrive at the equivalent in the form of a lump sum payable on his death; fourthly, further deductions must be made for the benefit accruing to the widow from the acceleration of her interest in his estate, and, fifthly, further amounts have to be deducted for the possibility of the wife dying earlier if the husband had lived the full span of life; and it should also be taken into account that there is the possibility of the widow remarrying much to the improvement of her financial position. It would be seen from the said mode of estimation that, many imponderables enter into the calculation."

11. The same principles were recalled by apex Court in the case of *Kamta Prasad and Another Vs. Jagan and Co. and Another*, . In this case the claim for compensation arose on account of loss of life caused by the collapse of the Clock Tower abutting a highway. The apex Court had referred to both the aforementioned judgments and extracted the following passage from the judgment in the case of *Davies* (1942) AC 601:

"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend upon 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 turned into a lump sum by taking a certain number of years purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent and other like matters of speculation and doubt".

12. In *General Manager, Kerala State Road Transport Corporation's case* (supra) apex Court called out the basic principles governing the assessment of compensation emerging from several legal authorities and reiterated that the multiplier method is the sound method of assessing compensation. It was observed as follows :

"The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalising 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."

The principle was explained and illustrated by a mathematical example :

"The multiplier represents the number of years" purchaser on which the loss of dependency is capitalised. Take, for instance, a case where annual loss of dependency is Rs. 10,000/-, If a sum of Rs. 1,00,000/- is invested at 10 percent annual interest, the interest will take care of the dependency perpetually. The multiplier in this case works out to 10. If the rate of interest is 5 per cent. per annum and not 10 per cent. then the multiplier needed to capitalise the loss of the annual dependency at Rs. 10,000/- would be 20. Then the multiplier i.e. the number of years" purchase of 20 will yield the annual dependency perpetually. Then allowance to scale down the multiplier would have to be made taking into account the uncertainties of the future, the allowances for immediate lump sum payment, the period over which the dependency is to last being shorter and the capital feed also to be spent away over the period of dependency Is to last, etc. Usually in English Courts the operative multiplier rarely exceeds 16 as maximum. This will come down accordingly as she age of the deceased person (or that of the dependants, whichever is higher) goes up."

13. It was clarified that there should be no departure from the multiplier method on the ground that Section 110-B of the Act corresponding to the present provision of Section 168(1) of new Act, envisaged payment of "just" compensation since the multiplier method is the accepted method for determining and ensuring payment of just compensation and is expected to bring uniformity and certainty of the awards made all over the country.

14. Taking into account the aforesaid two decisions of apex Court, adoption of multiplier of 14 would be appropriate. Worked out on that basis, loss, of dependency comes to Rs. 5,04,000/-. Amount as awarded by learned Single Judge towards loss of consortium and for mental agony etc. needs no interference. Claimants are entitled to a sum of Rs. 6,04,000/-. They shall in addition be entitled to receive interest " 6% per annum from the date of claim i.e. 22.7.1987. Out of total amount payable to the claimants inclusive of interest, 90% shall be kept in fixed deposit in any Nationalised Bank for a period of six years with no withdrawals permitted. It shall however be open to the claimants to seek withdrawal of such sum before expiry of stipulated period. On an appropriate application being filed indicating the need and quantum required. Tribunal shall consider the desirability to grant permission for withdrawal on

being satisfied about the need. Fixed deposit to be made shall be in the following ratio :

(i) Jayashree Rath - Widow - 30%. (ii) Biswakalyan Rath - Son - 19%. (iii) Sukanya Rath - Daughter - 35%. (iv) Krushna Chandra Rath - Father - 5%. (v) Harapriya Rath - Mother - 5%.

15. Out of the rest amount Rs. 20,000/- shall be paid to the father, and the balance to the widow on being identified by any of the learned counsel appearing for them before Tribunal. The amount fixed above inclusive of interest shall be deposited before Tribunal within one month from today as undertaken by learned counsel for insurer. In case deposit is not made as undertaken, it shall be open to claimants to move this Court for appropriate action.

The appeal is allowed to the extent indicated above.

S.C. Datta, J.

16. I agree.