(2013) 11 MAD CK 0247

In the Madras High Court

Case No : C.M.A. No. 2852 of 2009

K.Prema APPELLANT

Vs

Hotel Saravana Bhavan, Chennai-1 RESPONDENT

Date of Decision : 29-11-2013

Acts Referred:

Citation : (2014) 1 MadWN(Civil) 238

Hon'ble Judges : Mrs. S. Vimala, J.

Bench : Single Bench

Advocate : Mr. K.V. Ananthakrishnan, Advocate, for the Appellants; Mr. A. Saravanan, Advocate, for the Respondents No. 1; Mr. R. Sivakumar, Advocate, for the Respondent No. 2

Final Decision : Partly Allowed

Judgement

Mrs. S.Vimala, J.—Whether the maxim actio personalis moritur cum persona on which Section 306 of the Indian Succession Act is based, can have a blanket applicability in all actions, even in a case of personal injuries wherein the damages flow from the head of loss to the estate, is the issue raised in this Appeal?

2. The injured Palaniappan @ Subbiah, aged 49 years, lab technician, earning a sum of Rs.7,211/- suffered injuries in an accident that took place on 11.09.2001, arising out of water tanker lorry, bearing Registration No.TN01-A-7755. He filed claim petition in MCOP No.1338 of 2002 claiming compensation of Rs.10,00,000/-.

2.1. The Doctor certified the disability at 45%.

3. At the stage of arguments, the claimant died on 24.09.2006, i.e., nearly after five years of the accident. The appellants were brought on record. The Tribunal awarded a sum of Rs.65,000/- as compensation and the breakup details are as furnished here-under:-

Attendant charges

Rs.20,000/-

Extra nourishment

Rs.10,000/-

Transport charges

Rs.10,000/-

Medical expenses-

Rs.25,000/-

Total

Rs.65,000/-

4. In cases of personal injury caused in an accident, the injured may die out of the injuries caused or injuries may not be the cause for death. But there may be circumstances, the injured might have spent money on account of medical expenses, transportation, extra nourishment, cost of attendant, pain and sufferings and consequent loss of income. After spending money on all those counts, if a person dies, whether there is a loss? Whether that loss could be construed as a personal loss to the injured himself and therefore, the action dies along with him or it is a loss to the estate of the deceased and therefore, it survives to the legal representatives of the deceased. This is the main issue that is canvassed in this Appeal.

4.1. It is not the case of the claimants that the injured died out of the injuries sustained in the accident. But it is the case of the claimants that the injured spent substantial amount from the estate of the deceased and therefore, they are entitled to loss on account of loss to the estate.

5. How loss to estate occurs? Normally, a man''s earning is divided for three purposes. One is for his personal expenses, another part towards expenditure for family and the third one is towards savings to the estate. When a person is in need of money, on account of injuries or on any other account, he may be in a position to spend money from out of his estate. But, normally it is the legal representatives who spent money without waiting or without wanting the injured to depend upon money from the estate. Under such circumstances, whether the legal representatives are not entitled to get back what is spent by them towards saving the life/towards saving the interest of the deceased, is the question.

5.1. Loss to estate may arise in two ways. There may be loss of accretion to estate through savings. Other way is the existence estate may suffer loss by application of money towards medical expenses, expenditure on diet, expenditure on travelling, expenditure on attendant, etc., Therefore, the loss may be either on account of want of addition/accretion, i.e., savings or the loss may be on account of expenditure from the savings/estate. All possible loss, both positive and negative, must be considered by the Tribunal. But it is not so considered is the grievance of the claimants. Therefore, what are the items which are covered under the head ''loss to estate'' is also the dispute between the parties.

6. The Tribunal, while considering the claim of ''loss to estate'' has allowed certain head of claim and disallowed the remaining. Whether the disallowed portion of the claim survives to the legal representatives, is the issue to be considered in this appeal.

7. It is the contention of the learned counsel for the respondent that, the disallowed portion of the claim would not enure for the benefit of the legal representatives of the deceased, as the cause of action does not survive and that, the legal representatives are only entitled to the loss to estate under which medical expenses alone are to be paid and nothing more.

8. Learned counsel for the appellants has placed the material which defines the word ''estate'' and ''chose in action'' as the phrase ''choses in action'' are included under the word ''estate''. This definition covers, what is the meaning of the estate, vis-a-vis, the deceased person and estate vis-a-vis the living person. It would be relevant to extract the definition of the word ''Estate''. 8.

8.1 The ''estate'' of the deceased person is the bundle of rights, powers, immunities and liabilities which survive him. With reference to a living person, ''estate'' means the interest he has in lands and other subjects of property; it designates property, real or personal, in which he has a right or interest. B.Rajeevi R.Hedge v. Addl. Agni, I.T.O., (1981) 127 ITR 855, 858 (Ker). (Income Tax Act, 1961 S.159).

"An estate in land is the degree, quantity, nature or extent of the interest which a person has in it. While in its primary and technical sense the term "estate" refers only to an interest in land, yet by common usage it has acquired a much wider import and application, being applied to personal property as well as realty, and in its most extreme sense signifying everything of which riches or fortunes may consist. In many cases, therefore its precise meaning can only be ascertained from the context, or the circumstances under which it is used. As applied to land it does not necessarily import a free hold, but merely the quantity of interest a person has from absolute ownership to naked possession, and is applied to rights in land, both in possession and expectancy and to future estates either vested or contingent. (Ame. Cyc) Choses in action are included under the word ''estate''. ''Estate'' imports the most absolute property that a man can have in the thing of which it is spoken (Jacob)."

Choses in Action:-

8.2 The term "choses in action" is now used to cover a miscellaneous assortment of rights and properties.

"A chose or thing in action" is a term in contradistinction to a chose or thing in possession and is applicable to cases where the title to the money or property is in one person and the possession is in another, which by contract he is bound to deliver to the owner."

8.3. It is the contention of the learned counsel for the appellants that the accident has occasioned pecuniary loss to the estate of the injured in many ways and it is for the Tribunal to decide the loss, which has been occasioned to the estate, by considering the relevant head.

8.4. It is his further contention that the liability to pay compensation falls due even on the date of accident and that even if the claimants are found not to be a dependent upon the income of the deceased, they are entitled to loss to estate of the deceased, as a result of his death. It is claimed that ''loss to estate'' of the deceased would have to be ascertained keeping in view the income of the deceased and the amount the deceased would have spent on himself and the savings of the deceased which would then have to be quantified by the use of an appropriate multiplier with reference to the age of the claimants. In support of the contention, the decision reported in 2013 ACJ 19 (Budh singh v. Vijender Singh) is relied upon. This decision applies to the facts of the case.

8.5. Contending that pain and sufferings suffered by the injured would enure to the benefit of the estate, the decision reported in II 1999 ACC 372 (DB) (MP) (Kartar Kaur v. Dayal Singh) is relied upon.

"16. The deceased in his statement stated that he had spent Rs. 25,000 for medical treatment but no cash memo and vouchers or receipts were produced. However, looking to the nature of injuries, the deceased must have spent some amount towards medical care and special diet. He remained in hospital for about a week as an indoor patient and used to come thereafter for weekly check-up. Therefore, it would not be unreasonable to award a sum of Rs. 10,000 under the head of pecuniary damages. Under the head of non-pecuniary damages, the deceased suffered mental and physical shock, pain and suffering during his treatment which the appellant if would have survived, was entitled to get, that would besides pecuniary loss, form loss to the estate of the deceased. Therefore, it would not be inappropriate to award Rs. 15,000. Thus the appellants would be entitled to total compensation of Rs. 25,000 along with interest at the rate of 12 per cent per annum from the date of application, that is, 13.3.1989 till realisation."

8.6. Contending that loss of earnings of the lost years i.e., the period during which the deceased would have continued to work, but for his death, would also be covered under the head loss to estate, the decision reported in 1986 ACC 307 (Inderabai & Ors. v. M.P.Rajya Parivahan Nigam) is relied upon.

"15. ..... The contention of the learned Counsel for the respondents that after the death of the deceased the personal right to claim compensation for pain and mental suffering dies with the deceased, cannot be accepted in view of the

Supreme Court decision referred to above. Besides it has been held by a Division Bench of this Court in the decision (Ramesh Chandra v. MPSRTC, Bhopal) that the damages recoverable for loss to the estate of the deceased under Section 2 of the fatal Accidents Act must include damages for loss of earnings of the lost years, i.e. the period during which the deceased would have continued to work but for his death. Such damages should be assessed after deduction of an estimated sum to represent the victim''s probable living expenses during those years."

8.7. It is submitted that, but for the pain and sufferings, the time of the deceased would have been spent constructively for his earnings, which would have been contributed for the accretion to the estate, and therefore, compensation, on account of pain and sufferings, would go the benefit of the estate. In support of the contention, the decision reported in AIR 1985 SC 106 (N.Sivammal and others v. The Managing Director, Pandiyan Roadways Corporation) is relied upon.

"4. Thereafter, the High Court proceeded meticulously to examine every item of compensation included in the award. The High Court held that award of 5000/- under the head mental agony suffered by the claimants as a result of the death of the deceased cannot legally be sustained. This is only the different way of looking at the same thing which is legally permissible. Muthukrishnan lived for 19 days since the accident and he was throughout under a shadow of death. He had suffered severe injuries. He must have suffered continuous pain and compensation was admissible for pain and suffering, suffered by the deceased. Therefore, the amount of Rs. 5000/- which the High Court held inadmissible, is legitimately admissible under another head and therefore by charging the head we restore the amount of Rs. 5000/- awarded by the Tribunal."

8.8. Learned counsel for the respondents relied upon the following decisions, in order to support the contention that excepting medical expenses nothing would enure under the head of ''loss to estate''.

1. 1981 ACJ 185 (Thailammai and others v. A.V.Mallaya Pillai and others).

Referring to the provisions of Section 110A of the Motor Vehicles Act, especially Section 110B providing for survival of the cause of action to the legal representatives, where death has resulted from the accident, this Court came to the conclusion that Section 110A was an exception to the general principle Actio personalis moritur-cum-persona.

The Court considered the distinction between the cases, (a) where the death resulted from the accident and other cases of personal injuries, where the injury was not the cause for the death..............

"With reference to shock, pain and sufferings and loss of professional income it was held that cause of action did not survive. As I said, I have my own doubts, in view of the present provisions in the Motor Vehicles Act, about restricting the survival of the cause of action only to the case of death due to accident and not to the case of injury sustained in an accident and the injured dying pending disposal of application already filed by him.....

Even on the question of recovering the actual expenses incurred by the deceased, I have no doubt that the claim will survive since that amount, if had not been spent might have been available as the estate of the deceased to be succeeded by his legal representatives.

2. 1986 ACJ 440 (Melepurath Sankunni Ezhuthassan v. Thekittil Geopalankutty Nair).

6. So far as this country is concerned, which causes of action survive and which abate is laid down in section 306 of the Indian Succession Act, 1925, which provides as follows :

"306. Demands and rights of action of or against deceased survive to and against executor or administrator. - All demands whatsoever and all rights to prosecute or defend any action or special processing existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

Section 306 speaks of an action and not of an appeal. Reading section 306 along with Rules 1 and 11 of Order XXII of the Code of Civil Procedure, 1908, it is, however, clear that a cause of action for defamation does not survive the death of the appellant.

3. 1991 ACJ 707 Kannamma v. Deputy General Manager, Karnataka State Road Transport Corporation.

"12. In the result, the Full Bench answers the question referred for its decision by the Division Bench, thus:

(i) A claim petition presented under Section 110A of the Motor Vehicles Act, 1939, by the person sustaining bodily injuries in a motor accident, claiming compensation for personal injuries as also for compensation towards expenses, loss of income, etc., (loss to estate) cannot, on such person''s death occurring not as a result or consequence of bodily injuries sustained from a motor accident, be prosecuted by his/her legal representatives; but

(ii) A claim petition presented under Section 110A of the Motor Vehicles Act, 1939, by the person sustaining bodily injuries in a motor accident, claiming compensation for personal injuries as also for compensation towards expenses, loss of income, etc., (loss to estate) can, on such person''s death occurring as a result or consequence of bodily injuries sustained in the motor accident, be prosecuted by his/her legal representatives only in so far as the claim for compensation in that claim petition relates to loss to estate of the deceased person due to bodily injuries sustained in the motor accident".

4. 2000 (IV) CTC 528) The Managing Director, Pandiyan Roadways Corporation, Madurai v. S.Rajalakshmi and four others.

"10. Therefore, I have no other alternative except to allow the appeal in so far as the amount which has been awarded towards personal injuries. The legal representatives of the claimants would be entitled only to be compensated as regards the actual expenses incurred by claimant for his treatment. In this context, in the claim petition, a sum of Rs.18,000 is claimed towards expenses with reference to medicines and medical charges including for Doctors and for the attenders. Therefore, the respondents herein would be entitled to only a sum of Rs.18,000."

5. 2010 (2) TN MAC 243 (Mad) (Manoharan (Late) v. The Managing Director, Tamil Nadu State Transport Corporation, Dharmapuri).

The judgment of the Gujarat High Court in Jennabai v. Gujarat State Road Transport Corporation, 1991 ACJ 585, wherein the finding given, as extracted below, has been referred in the above judgment.

"10. Tort, frequently, involves a non-pecuniary loss. Even pecuniary loss of the deceased, being personal to him has no proper entitlement to a place in the assessment of the damages which goes to his estate. But for the pecuniary loss suffered by the deceased on account of such injuries, an action would lie or action would survive for the benefit of the estate of the deceased. The claim, on account of loss to the estate of the deceased, would, undoubtedly, survive and would pass over to his heirs or legal representatives. Section 306 of the Indian Succession Act does not exclude right to recover claim on the basis of proprietary right. In a case of personal injuries, arising out of vehicular accident, it may include pecuniary loss as well. This pecuniary loss or any loss which is referable to the loss to estate would be a proprietary or right pertaining to property. Therefore, the right to maintain the action or to continue the action for recovery of pecuniary and proprietary loss which are referable or attributable to the loss to the estate, cannot be said to have been taken away by the provisions of Section 306 of the Indian Succession Act.

6. 2011 (1) TN MAC 826 (New India Assurance Co. Ltd., Rep. By the Manager v. S.Pooranam).

"5. But in the instant case on hand, evidently it is established through the materials available on record that the death of the injured is not proximate to the injury sustained by him in the alleged accident. When such being the case an action for personal injury not causing death of the injured Sithivinayagam, does not survive to the first respondent/second claimant who is none other than the wife of the original claimant Sithivinayagam.... "

8.9. The decisions relied upon by the learned counsel for the respondents have been answered by the decisions relied upon by the learned counsel for the appellants.

9. The only question to be decided is, what is the appropriate quantum of compensation to be awarded under the relevant heads which could be attributable to loss to estate.

9.1. The decisions, referred to above, had given considerable guidance to this Court as to decide the appropriate head of claim.

9.2. The date of accident is 11.09.2001. The injured died on 20.04.2006. He has been admitted in the hospital on 11.09.2001 for the pelvic fracture surgery has been done on the same day. Bladder repair has been done. He has been discharged on 18.10.2001. External fixation for pelvis applied on 12.09.2001. These details find place in Ex.A-4. He has been attending Royapettah Outpatient Division for six months, according to his evidence.

9.3. The nature of injury, period of treatment and the part of the body affected would go to show that pain and sufferings must have been much more.

9.4. The evidence with regard to medical ailment is supported by the evidence of the Doctor. According to Dr. Sai Chandran, there is fracture of left hip bone; At the joining of the hip bone with the back bone, there had been expansion of bone; Implant has been used and later on, it has been removed; The expanded bone did not come to normal level; The fractured bone had mal-united; There had been disability, which has been assessed at 45%.

9.5. These details must be used for the purpose of calculating the medical expenses, loss on account of leave and other connected expenses. The period of treatment is the other relevant factor, which should be considered to calculate the loss.

9.6. It is the case of the claimant that the injured was not able to attend his job regularly and that, he was on leave for a period of 212 days and that, but for the accident, the leave period would have been utilised for some other purpose. The salary for the leave period would have gone to the benefit of the estate.

9.7. The salary of the injured, as per Ex.P-4, is Rs.7,211/-, rounded to Rs.7,200/-. But, as per the evidence of the assistant from the Department, the last pay drawn salary of the injured was Rs.10,000/- and odd. Therefore, the average monthly income can be taken at Rs.8,500/-. For 212 days, the loss of income would be Rs.60,066/-, rounded off to Rs.60,000/-. As there are four members in the family, the personal expenditure must be 1/5th only. Therefore, deducting a sum of Rs.10,000/- towards personal expenses, contribution to the estate would be Rs.50,000/-.

9.8. Considering the inpatient treatment for a period of 45 days and considering that because of external fixation around the hip, he would have been immobile, for a considerable period of time, Pain and sufferings is awarded at Rs.75,000/-;

Medical expenses at Rs.50,000/-; cost of attendant at Rs.35,000/- (having regard to external fixation done and bladder repair being done); extra nourishment at Rs.20,000/-; Transport expenses at Rs.20,000/-. Thus, the total compensation payable would be Rs.2,50,000/-.

10. In the result, the Civil Miscellaneous Appeal is partly allowed, enhancing the total compensation from Rs.65,000/- to Rs.2,50,000/-. No costs.

11. The Insurance Company/second respondent herein shall deposit the entire amount of compensation, less the amount already deposited, if any, along with interest at 7.5% per annum, from the date of petition to till the date of deposit, on the enhanced amount, within a period of six weeks from the date of receipt of a copy of this judgment.

11.1. On such deposit, the claimants are entitled to the compensation, as per the apportionment, made by the Claims Tribunal. The major claimants are entitled to withdraw their share of compensation. The share of the minor claimants shall be invested in any one of the nationalised banks, initially for a period of three years, periodically renewable thereafter, till they attain majority. The natural guardian of the minor claimants is entitled to receive the interest on such deposits, once in three (3) months, directly from the Bank, under intimation to the Tribunal and it shall be used for the benefit and welfare of the minor claimants. On attaining majority, the minor claimants are entitled to withdraw their share.