(2018) 07 KAR CK 0006

In the Karnataka High Court

Case No : Miscellaneous First Appeal No.1917, 1221 of 2015

K.Yellappa and Ors @APPELLANT@Hash N.Manju and Ors

Date of Decision : 13-07-2018

Acts Referred:
Motor Vehicles Act, 1988 — Section 123, 128(1), 129, 173(1)

Citation : (2018) 07 KAR CK 0006

Hon'ble Judges : S. SUNIL DUTT YADAV, J

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

1.,Loss of dependency,"Rs.9 ,60,000/-

2.,Transportation of dead body and Funeral expenses,"Rs.25,000/-

3.,Loss of love and affection,"Rs.25,000/-

4.,Loss of estate,"Rs.20,000/-

,Total,"Rs.10,30,000/-

contributory negligence does not depend upon any breach of duty. The breach of duty should result in injury and consequent losses. If there is a blame,,

causing the accident on both sides, the losses lice where it falls. Therefore, in the instant case, merely because the deceased was riding the",,

motorcycle with two persons on the vehicle though it amounts to contravention of Section 123 of the Act it does not amount to a negligent act on the,,

part of the deceased. The driver riding the vehicle if it is demonstrated lost control of the vehicle, he was not able to balance the vehicle or because of",,

such contravention he dashed against the vehicle which resulted in the accident then the question is to what extent this breach of duty resulted in,,

negligence is to be assessed by the Court.â??,,

(ii) In the same judgment, reliance is also placed on the observations made by the Full Bench in the case of North East Karnataka Road Transport",,

Corporation Vs. Smt.Vijayalaxmi and others reported in 2012 (3) KCCR 1772 as follows:-,,

â??â?¦â?¦..Therefore, the question of contributory negligence does not depend upon any breach of duty as between the plaintiff and the defendant",,

such a breach of duty should result in injury and consequent losses. In other words, there should be a nexus between the breach of duty and the injury.",,

If there a blame causing the accident on both sides, the losses lie where it falls. The omission constitute a careless conduct. Foresight is the test for",,

duty and awareness.â??,,

Further, it is observed as follows:-",,

â??â?¦â?¦â?¦â?¦The contravention of the aforesaid provision is nothing to do with the entitlement of compensation. Therefore, the argument of learned",,

counsel for the Corporation that a passenger who has travelled on the roof top of the bus is not entitled to compensation to the full extent and he will,,

be entitled to compensation to the extent of only 50% in the event of any accident resulting in injury or death cannot sustained,,

(iii) In M.F.A.No.6360/2008 clubbed with M.F.A.No.6361/2008 [Divisional Manager, National Insurance Company Limited Vs. Smt.Sunanda and",,

others] dated 24.6.2010, where on similar facts i.e., where there were three persons riding the motor cycle and the accident had occurred, the Division",,

Bench had observed at page 17 as follows:,,

â??â?¦â?¦In the instant case, no doubt apart from the rider of the motor cycle there were two pillion riders. It is in violation of Section 128. But there",,

is nothing on record to suggest that just becausethree persons were on the motor cycle, that was the cause for the accident to any extent whatsoever.",,

In the absence of any such evidence mere contravention of a statutory provision cannot be held to have resulted in the accident. Therefore on that,,

score alone negligence cannot be attributed to the violators of the law. It is not possible to hold that merely because there were three persons in,,

vehicle that by itself is a negligent act so as to foist the liability on the violators of law.â??,,

It is also pointed out that the judgment relied by the claimant in the case of P.S. Somaiah referred to supra has been distinguished by observing that the,, observations were made in the context of the facts of a particular case and no law as such is laid down, which is found at page 16 of the said",,

judgment.,,

(iv) In the case of Bharma Kallappa Murashetti and others Vs. Karmajeeth Kaur and others reported in 2017 ACJ 1758 wherein on similar facts as,,

the present case the Court after referring to all earlier judgments observes at para-8 that the evidence had to be let in to establish that the violation of,,

statutory provision was also a cause for the accident upon which there could be attribution of contributory negligence. In the said decision, the Court",,

also observes that burden of proof lies on the insurer to adduce evidence to establish contributory negligence and the burden would also extend to,,

proving that the breach of policy ought to be fundamental in nature so as to bring the contract to an end.,,

Â (v) Sudhir Kumar Rana Vs. Surinder Singh and others reported in (2008) 12 SCC 436 at para 9, the Apex Court has held as under:",,

â??9. If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence",,

as regards the accident. It has been held by the courts below that it was the driver of the mini truck who was driving rashly and negligently. It is one,,

thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and,,

negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a",,

licence, he would be held to be guilty of contributory negligenceâ??.",,

(vi) In the case of Union of India Vs. United India Insurance Co. Ltd., reported in (1997) 8 SCC 683 wherein the Court had observed that as regards",,

a passenger who lodges a claim, the passenger could not be equated with a driver as regards identifying the extent and imposition of the contributory",,

negligence.,,

Observations in para 10 are relied upon which are as ollows:,,

â??10â?¦â?¦â?¦There cannot be a fiction of passenger sharing a â??right of controlâ?? of the operation of the vehicle or is their a fiction that the,,

driver is an agent of the passenger. A passenger is not treated as a backseat driver. It is therefore clear tha even if the dirver of the passenger vehicle,,

was negligent, the Railways, if its negligence was otherwise proved â?" could not plead contributory negligence on the part of the passengers of the",,

vehicle. What is clear is that the qua the passengers of the bus who were innocent, the driver and owner of the bus and if proved, the Railways can all",,

be joint tortfeasors.â??,,

10. The last contention of the claimants is that the burden of proving is primarily on the insurer in the absence of any positive evidence. In the facts of,,

the present case, it cannot be said that the insurer has discharged the burden placed on him entitling for scaling down of compensation on the ground",,

of contributory negligence.,,

11. The claimants have sought for enhancement as regards the income, that has been adopted for calculating the compensation, contending that in the",,

absence of positive evidence regarding the same the tribunal ought to have relied upon the Lok Adalath guidelines regarding notional income.,,

12. Heard both sides. The points that arise for consideration are:,,

(i) Whether a pillion rider in a motorcycle being ridden by a rider with another person travelling in the bike could be liable to have his claim scaled,,

down on the ground of contributory negligence, on the ground that there were three persons travelling in a motor cycle, as made out in the present",,

case?,,

Â (2) Whether the claimants are entitled to enhancement and if so to what extent?,,

13. Point No.1: The contention of the insurer is to the effect that violation of Section 128 of the Act would disentitle the claimant for any relief in so,,

far as absence of adhering to safety measures statutorily incorporated ought to be viewed strictly so as to penalize non-adherence by disallowing,,

claims. While the argument of claimant on the other hand is that in view of settled law, unless the non-adherence to statutory safety measures was",,

demonstrably a contributing factor to the accident and that the nexus ought to be established between the statutory infraction and the accident, the",,

question of attributing contributory negligence would not arise. A bare perusal of the judgments referred to and relied upon by the claimant clearly lays,,

down the law that there has to be a nexus between the statutory infraction and the accident. The decision in M.F.A.No.6360/2008 other connected,,

matters is strictly on the point and covers the fact situation. It is relevant to note that the decision relied upon by the insurer in P.S.Somaiahâ??s case,, has also been distinguished by observing that no law is laid down in P.S.Somaiahâ??s case and the observations were to be treated as mere,,

observations and not as laying down the law as regards liability. The principle of law also in the case of Bharma Kallappa Murashetti, on similar facts",,

also point to a similar conclusion. The decision of the Supreme Court in the case of Sudhir Kumar Rana Vs. Surinder Singh reported in (2008) 12 SCC,,

436 is very clear, where the court has observed that mere absence of a licence could not lead to a positive finding as regards contributory negligence.",,

In the light of the above said judgments, it is clear and unequivocal that there needs to be a nexus between riding of the motor cycle by three persons",,

and the accident that had been caused. The only other judgment that has been relied upon by the insurer in M.F.A.No.7074/2016 [The Oriental,,

Insurance Co. Ltd. Vs. Naresh Babu and another] could be distinguished by observing that the observations were made in a case relating to infraction,,

of Section 129 of the Act which provides for wearing of protective head care and the Court on the facts of the said case, has positively observed that",,

head injury was one of the contributory facts and the claimant in the said case had admitted that head injuries could have been avoided if the helmet,,

was worn. The said admission and also nature of injuries that had occurred which had a nexus with the non-wearing of a Helmet is a distinguishing,,

factor, which is not so in the present case. In the light of the above law, its application in the present case is to be dealt with.",,

14. The subsidiary contention that requires to be dealt is as under:,,

â??Whether in the facts of the present case, the insurer had discharged the burden of establishing the factum of three persons riding on the motor",,

cycle had attributed to the occurrence of the accident?â??.,,

15. The insurer, no doubt, has raised the contention of triple riding as being a contributory factor in the statement of objections, but there is no positive",,

evidence that has been adduced by the insurer nor any steps have been taken to prove such defence. The nature of burden of proof of the insurer has,,

been dealt with by the Apex Court in Lakshmichand Vs. Reliance Insurance General Co. Ltd. reported in 2016 ACJ 551, wherein it has been held that",,

in order to avoid liability, the Insurance Company must not only establish the defence claimed in the proceeding concerned, but also establish breach",,

on the part of the owner of the vehicle and such burden of proof would rest on the Insurance Company. The Apex Court had also approved the,,

observations in the case of B.V.Nagaraju Vs. M/s. Oriental Insurance Co. Ltd. reported in 1996 ACJ 1178 to the effect that the breach complained,,

of must be so fundamental that it would bring the contract to an end.,,

16. In the present case, it is clear that charge sheet has been filed against the driver of the TATA Goods Vehicle, no effort has been made to file a",,

complaint against the rider of the motorcycle and in the absence of any steps being taken by the insurer to summon the rider of the motorcycle, the",,

insurer has failed in its duty in proving the defence in terms of the obligation imposed in Laxmichandâ??s case (supra). In fact, the panchnama at",,

Ex.P.4 reveals that the accident has taken place at a spot where the road curves as â??Lâ?? shaped and the road was under repair and was being,,

laid out afresh. In the light of such facts, there was a duty on the driver of the goods vehicle to observe a higher degree of care and caution and to",,

impute negligence on the victim is not legally tenable.,,

17. The deceased being a pillion rider assumes significance as regards the attempt of imputation of negligence to scale down the liability in the light of,,

observations of the Apex Court in the case of Union of India Vs. United India Insurance Co. Ltd. and others reported in (1997) 8 SCC 683, which",,

clearly lays out that the driver could not be said to be an agent of the passenger and there could not be a fiction of the passenger sharing a â??right of,,

controlâ? of the operation of the vehicle. It is also clarified that the passenger essentially being innocent, negligence at the most could have been",,

attributed to the owner and driver of the bus.,,

18. Extending the above mentioned principle to the facts of the present case, the fact that the deceased was a pillion rider would free him from",,

bearing contributory negligence. If it were that the deceased was a driver, the case would have been entirely different, which is not so. Accordingly,",,

there could be no question of imputing negligence to a pillion rider. Hence, the defence of the insurer as regards imposition of liability on the pillion",,

rider on the ground of non-adherence to statutory safety measures is rejected. Accordingly, the question framed is answered in the negative.",,

Re:Point No.2.,,

19. The appellants have assailed the order the Tribunal contending that adoption of income of the deceased as Rs.5,000/- per month contending that it",,

was on the lower side and at the least the income as stipulated under the Lok Adalath guidelines ought to have been taken judicial notice of. The,,

claimants have not let in any evidence apart from the mother of the deceased as regards the avocation or income of the deceased. In the absence of,,

positive evidence as regards nature of avocation, it would be appropriate to adopt the income as stipulated under the Lok Adalath guidelines,",,

considering the date of accident i.e., 15.8.2013, the income of the deceased could be taken as Rs.8,000/-per month with future prospects of 40% on",,

the said income. The income to be taken for the purpose of calculating loss of dependency would be Rs.11,200/-.",,

20. As regards deduction, the Tribunal has taken the deduction at 1/3rd of the income while the counsel for the insurer contends that it is settled law",,

that deduction of 50% has to be taken note of as the deceased was a bachelor. Though the claimants contend that where the family is large, as in the",,

present case and the dependents are also large in number, by restricting deduction towards personal and living expenses, deduction could be",,

reconstructed at 1/3rd. However, considering that the father of the deceased was alive and aged 48 years and also considering that two of his sisters",,

were elder to him, deduction of anything less than 50% is not supported by evidence or material on record and hence, the deduction by the Tribunal at",,

1/3rd is set aside and deduction of 50% is to be taken into account. Accordingly, considering the future prospects and deduction at 50%, loss of",,

dependency would be recalculated as follows:,,

8000 x 40% = 11,200 x 50% x 12 x 18 = Rs.12,09,600/-",,

21. As regards the compensation on conventional heads, the Tribunal has granted Rs.50,000/-and in view of the judgment in the case National",,

Insurance Company Limited v. Pranay Sethi and others reported in AIR 2017 SC 5157, the compensation under conventional heads is scaled down to",,

the extent of 30,000/-. Accordingly, the compensation works out to Rs.12,39,600/-. Hence, the compensation would be enhanced by Rs.7,24,600/-.",,

22. Accordingly, the appeal as regards the claimants is allowed-in-part and the compensation stands enhanced. The appeal of the insurer, viz.,",,

M.F.A.No.1221/2015 seeking fastening of liability on the owner and scaling down of quantum is dismissed.,,

23. In view of the above the amount in deposit is ordered to be transferred to the Tribunal along with Fixed Deposit bonds.,,

