

(1994) 08 MP CK 0027

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 139 of 1992

M.P. State Road Transport Corporation

APPELLANT

Vs

Vaijanti and Others

RESPONDENT

Date of Decision : 10-08-1994

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A, 110B

Citation : (1994) 2 ACC 604 : (1995) ACJ 560 : AIR 1995 MP 122

Hon'ble Judges : S.K. Dubey, J;A.S. Tripathi, J

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

S.K. Dubey, J.—The Madhya Pradesh State Road Transport Corporation (MPSRTC) has preferred this appeal under. Section 173 of the Motor Vehicles Act, 1988, against the award dated 31-1-1992, passed in Claim Case No. 2 of 1987, by Second Additional Motor Accident Claims Tribunal, Shivpuri, for short, the "Tribunal".

2. Material facts giving rise to this appeal are these. One Suresh Kulkarni, aged about 37 years, working as Welfare Officer in the State Bank of India at Shivpuri Branch, drawing monthly salary at the rate of Rs. 2,415/-, was travelling on 3-7-1983 as a passenger in passenger bus, owned by the MPSRTC, No. MPE 2600. The said bus was being driven by Laxmi Narain, respondent No. 4, during the course of his employment under the MPSRTC. While the bus was coming from Indore and going towards Bhind, near Badarwas, District Shivpuri, a truck No, URC 3981, owned by respondent No. 5, driven by one Chandgiram, the driver, and insured by New India Insurance Co., the respondent No. 6, was going ahead of the bus. The bus driver asked for the side so as to overtake the said truck. According to the MPSRTC and its driver, the said truck driver gave side and allowed the bus to pass ever. It is said that when the bus overtook, the said truck dashed in the rear portion of the bus. which resulted in an accident, while according to the owner of the truck, the bus driver dashed in the rear portion of

the truck resulting in the accident "as a result of which, the passenger Suresh Kulkarni received multiple injuries and died at the spot. The claimants, i.e., his widow, a minor son and daughter and the father of the deceased filed an application on 28-9-1983 u/s 110-A of the Motor Vehicles Act, 1939, for short, the "Act" in form CAA under Rule 277 of the M.P. Motor Vehicles Rules, 1977, for short, the "Rules", for compensation against the owner and driver of the bus and also against the owner, driver and insurer of the truck.

3. In spite of repeated summrins issued in ordinary manner as well as by registered post, the summons on the driver of the truck, i.e., Chandgiram, could not be served. The Tribunal also made an effort to serve the summons on the driver on the date of appearance in the criminal case arising out of the same accident, pending in the Court of the Judicial Magistrate, First Class at Kolaras, which is apparent from the order sheet dated 31-1-1987, but the summons sent to the Judicial Magistrate, First Class could also not be served. Ultimately, when the summons was not served, the Tribunal directed to take appropriate steps. Therefore, the claimants' counsel on 28-10-1987, filed an application for deleting the name of the driver of the truck from the array of the parties. All the non-applicants took time to file reply and to argue on the said application; when the non-applicants stated that they have no objection, the Tribunal passed a consent order stating that as the parties submitted that case is prolonging since long only for want of service of the driver of the truck; his name be deleted. The Tribunal thereafter framed the issues. Issue No. 1(a) related to the rash and negligent driving of the driver of the bus while issue No. 1(b) related to the rash and negligent act of the driver of the truck.

4. The Tribunal, after recording of evidence, held that the driver's of both the vehicles were rash and negligent which resulted in the accident; While deciding issues Nos. 3, 4 and 9, the Tribunal held the monthly dependency of the claimants at the rate of Rs. 1,000/-, and by applying the multiplier of 16 into the multiplicand of Rs. 12,000/-, compensation was calculated at Rs. 1,92,000/-. A sum pf Rs. 2,000/- each to the two children for the loss of love and affection and Rs. 5,000/- towards consortium to the widow was also awarded. Out of the total amount of compensation, towards the payment of lump sum and uncertainties of life, a deduction of 10% was made. After deduction, award of Rs. 1,80,900/- with interest at the rate of 12% per annum from the date of application till realisation was passed against all the non-applicants. To safeguard the interests of minors, the Tribunal directed that Rs. 50,000/- for each of the minors to remain in deposit in a nationalised bank in joint account of the claimants till the two minors attained their majority.

5. The claimants have filed cross-objections under Order XLI, Rule 22, C. P. C. for enhancement of the compensation to Rupees 10,14,200/-, while the Insurance Company has filed the cross-objection for setting aside the award against the insurer and owner on the ground that the driver was a necessary party to the claim petition, therefore, the claim petition be dismissed on that count and also

that there no rash and negligent act of the truck driver was pleaded by the claimants in the claim petition.

6. Before the appeal could be heard on merits, Shri N. K. Modi, learned counsel for the claimants, submitted that the cross-objections filed by the insurance company, on an appeal filed by another co-respondent are not maintainable and are liable to be dismissed as Order XLI, Rule 22, C.P.C. permits, as a general rule, a respondent has to prefer an objection only against the appellant. In our opinion, the objection has no merit. Order XLI, Rule 22, C.P.C. permits, as a general rule, a respondent to raise all pleas by way of cross-objection to the decree appealed against which he could have taken by way of appeal. But, in exceptional cases, such as where the relief sought against the appellants in such an objection is inter-mixed with the relief granted to the other respondent, so that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents, that an objection under Order XLI, Rule 22, C.P.C., can be directed against the other respondents. It is only by way of exception to this general rule that one respondent may urge cross-objection as against the other respondents. The exception holds good, among other cases, in those in which the appeal by some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. See, *Pannalal Vs. State Bombay and Others*, ; *Shazadi Begum v. Vinod Kumar* (AIR 1978 MP 20) and *Bhagwan Das and Another Vs. National Insurance Company Ltd. and Another*, .

7. In the case in hand, the defence of the Insurance Company is that on the deletion of the driver from the array of the opposite party in the claim petition, the claim ought to have been dismissed against the owner and insurer of the truck, as the driver is a necessary party for seeking compensation, a claimant has to first establish the rash and negligent act of the driver so as to make owner vicariously liable, in that case alone, the Insurance Company has to indemnify the insured if the owner is found liable under the law of torts. Hence, it was submitted by Shri V. K. Sharma, counsel for the Insurance Company that when the driver has been deleted from the array of the parties, who being a necessary party, no finding could have been given against him without affording him an opportunity of hearing. Moreover, it is clear from Section 110-B of the Act and Rule 277 of the Rules and the Form "C.A.A. "that driver is a necessary party to an application for compensation. Therefore, in the absence of the driver, the claim was liable to be dismissed. It was also submitted that relating to tortious liability in cases of motor accidents, the Claims Tribunal has been conferred with the special jurisdiction, it is well-settled that in case of an Act which creates a new jurisdiction a new procedure, new forums or new remedies, the procedure, the forums or remedies (those provided and not others) must be strictly followed. The owner, driver and insurer are necessary party to the proceedings and non-joinder is a serious defect and, therefore, the application ought to have been dismissed against the owner and the Insurance Company. Learned counsel

pressed into service a Full Bench decision of this Court in case of Mangilal Vs. Parasram and Others, a Division Bench decision in the case of Madhya Pradesh State Road Transport Corporation, Jabalpur Vs. Jahiram and Another, and two single Bench decisions of this Court wherein, the driver was held to be a necessary party, New India Assurance Co. Ltd. Vs. Munnidevi and Others, and Shahzad Khan v. M.A.C.T., Shivpuri (1986 (1) MP WN 28). .

8. To meet this objection, Shri N.K. Modi, learned counsel for claimants, placing reliance on a single Bench decision of this Court, in the case of Bhagwati Prasad v. Oriental Fire & General Insurance Co. (1989 (1) MPWN 6) and a Division Bench decision of Patna High Court in the case of Badri Narain Prasad Vs. Anil Kumar Gupta and Another, as also on a decision in the case of Babu Singh Vs. Smt. Champa Devi and Others, : Submitted that under torts, the liability of joint tortfeasors is joint and several. Each may be sued alone or jointly along with the other. Each is liable for the whole damage and judgment obtained against all of them may be executed in full against anyone of them, therefore, deletion of the name of the driver of the truck from array of parties has no effect.

9. After giving anxious consideration to "the arguments raised, we are of the view that the impleadment of the driver of the offending vehicle is necessary in an application for compensation u/s 110-A. His impleadment is not an empty formality, nor a driver is a pro forma defendant. The liability of insurer and owner arises only when negligence of the driver is not only pleaded, but is also established. If the driver is not found to be rash and negligent, no liability can arise either of owner or of the Insurance Company. Negligence of the owner or driver is a sine qua non for such liability. See, Mangilal's case (AIR 1971 Madh Pra 5 (FB)) (supra).

9A. An application for the compensation is to be made in form "C.A.A." under Rule 277 of the Rules. Sub-rule (1) of Rule 277 lays down that an application for a claim for compensation arising out of an accident of the nature specified in Sub-section (1) of Section 110-A of the Act shall be made in form "C.A.A." appended to these Rules to the Claims Tribunal having jurisdiction in which the accident occurs. Form "C.A.A." prescribes that opposite parties are shown as the owner of the vehicle, party No. 1, driver as party No. 2 and Insurer as party No. 3. Para No. 1 of the form requires that in the application, the circumstances in which accident occurred, giving vehicle number, owner's and driver's name and also, the time, date, place and other necessary details of the occurrence.

10. Driver is a necessary party, is also clear from Section 110-B of the Act which says that on receipt of the application for compensation made u/s 110-A, the Claims Tribunal, after giving an opportunity to the parties of being heard, may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid; and in making the award, the Claims Tribunal shall specify the amount which shall be paid by the Insurer or owner or driver of vehicle involved in the accident or by all or any of them, as the case may be. From the above provision,

it is clear that the Tribunal has been vested with the discretion to award jointly or severally and joint award need not always be passed. It is Tribunal's discretion to apportion lawfully the liability or saddle in its entirety on "all or anyone of them" -- "the insurer or the owner or the driver".

11. In view of the above and the fact that the jurisdiction of ordinary civil Court has been substituted and conferred on the Motor Accident Claims Tribunal and the Tribunal has to exercise the powers conferred on it by the statute, i.e., the Act, contained in Chapter VIII of the Act, and has to deal with the application for compensation in accordance with the procedure prescribed in the Rules which are contained in Chapter IX of the Rules, it is well-settled rule of interpretation that when a statute confers a power and prescribes a mode of doing a certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performances are necessarily forbidden. See, *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, ; AIR 1936 253 (Privy Council); *State of Uttar Pradesh Vs. Singhara Singh and Others*, and the case of *Madhya Pradesh State Road Transport Corporation, Jabalpur Vs. Jahiram and Another*, . Therefore, we are of the view that Single Bench decision in case of *Bhagwati Prasad* (1989) 1 MPWN 6) (supra) does not lay down the correct law, while we are in agreement with the view taken in *New India Assurance Co. Ltd. Vs. Munnidevi and Others*, . Because of the view taken by us, we respectfully are unable to contribute to the view taken by Patna High Court in case of *Badri Narain Prasad Vs. Anil Kumar Gupta and Another*, and by Allahabad High Court in case of *Babu Singh Vs. Smt. Champa Devi and Others*, .

12. But, here, the question arises whether in case like this, where the driver was initially impleaded as a party who could not be served in spite of all efforts made to serve him, leaving publication and when the application was moved, for deleting the name of the driver, the name of the driver was deleted with the consent of the parties to avoid further delay in the case, the insurance Company can now be allowed to contend that the award is bad for non-joinder of the driver of the truck. The insurance Company or the owner of the truck did not oppose the application. Had the application been opposed, the Tribunal could have passed a different order. Therefore, in view of the consent order of deletion of the name of the driver and thereafter, issues being framed, the insurance company cannot be allowed to raise the objection in appeal; the objection shall be deemed to have been waived and on that count, the award passed by the Tribunal cannot be allowed to be defeated.

13. Besides, the owner and the insurance company were having opportunity to produce the driver to establish that there was no rash and negligent act of the driver of the truck, more particularly when the issue No. 1(b) was raised by the Tribunal. No reason has been assigned by the owner and the insurance Company for non-examination of the truck driver. In accident cases, it is absolutely necessary to have the first hand report from the driver. It may be that the driver does not always speak the truth, but the driver's version is the one which is to

be given the best consideration. He is the person who knows about the occurrence. He also knows as to what actually happened. Therefore, the driver having not been examined, necessarily, an adverse inference arises against him. See, the decisions of this Court in *R.H. Kumariji v. N.I.A. Co. Ltd.* (1974) MPLJ 462) and in *K.K. Jain and Another Vs. Smt. Masroor Anwar and Others*, . Therefore, in the circumstances, the finding recorded on issue Nos. 1(a) and (b) that both the drivers were equally responsible for the accident, is based on appreciation of evidence adduced by the parties. Hence, no interference is warranted in appeal.

14. Coming to the question of quantum of compensation, it is well settled that multiplier method for ensuring "just" compensation is logical, sound and legally well-settled. In assessing the compensation by the method of capitalisation of net income choosing a multiplier appropriate to the age of the deceased or the age of the dependent, whichever multiplier is lower is an appropriate method. Whenever a multiplier is selected, it cannot be equal to the number of years of dependency or to the remainder of the life of the deceased. It is much less, taking into account the uncertainties of life. It takes care of the acceleration of the interest of the claim in the benefit which might have received on the death of the deceased. It takes into consideration all the heads for which the compensation can be awarded. It is a right and ready and more scientific method of capitalisation of the loss of dependency, wherein no deduction for uncertainties of life or for lump sum payment are "permissible. See, *National Insurance Co. Ltd. Vs. M/s. Swarnalata Das and others*, ; *General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others*, : (AIR 1989 MP 93); *MPSRTC v. Smt. Sushiladevi* (1990 2 MPWN 6). In the present case, the dependency calculated is at the rate of Rs. 1,000/- per month and Rs. 12,000/- yearly, but the multiplier applied of 16 is on higher side as the deceased was in his thirties. Therefore, the multiplier ought to have been selected of 15 as is the view of this Court in *Ashadevi's* case (*supra*) and recently said by the Supreme Court in the case of *Swarnalata Das* (*supra*). Therefore, applying the multiplier of 15 by the multiple of Rs. 12,000/-, the amount of compensation comes to Rs. 1,80,000/-.

15. The Tribunal has not awarded any amount for the loss of estate, as it is well settled that in a case when multiplier is selected, damages for mental agony, suffering and loss of expectation of life being loss caused to the estate of the deceased, are awardable besides the amount of compensation determined by the principle of multiplier applied. The claimants are, therefore, entitled to compensation of this which should be a nominal figure, say, Rs. 5,000/-, in the present case. For that, we rely on a decision of this court in the case of *Fizabai and Others Vs. Nemichand and Others*, . In the head of consortium to widow, a* conventional and nominal figure has to be awarded. However, the award of Rs. 5,000/- is on lower side, which should be, in *pur* opinion, Rs. 10,000/-. Similarly, with respect to the amount awarded to the two children, it should be Rs. 5,000 / - each for the loss of company, love and affection. Thus, the total amount to

which the claimants are entitled to is Rs. 2,00,000/- besides interest at the rate of 12% per annum from the date of the application till payment.

15A. Shri A.K. Shrivastava, learned counsel for the appellant, placing reliance on an unreported decision of this court in Takhatsingh v. Ratanlal (M.A, No. 137 of 1985, decided on 5-12-1992) and a single Bench decision in Sanjay Kumar v. Munnalal (1992 1 2 MPJR 89) and decision of Delhi High Court in Kanta and Others Vs. Jaswant Singh and Others, submitted that because of the delay in disposal of the claim as the trial remained limping for a long time, the interest should be awarded from the date, of the award. True, while awarding interest, a tribunal has to consider all the facts and circumstances. But, in the facts of the case in hand, we do not find any delay on the part of the claimants. It is only that the case could not proceed because the driver of truck could not be served. For that, claimants cannot be made to suffer.

16. It was submitted lastly by Shri Shrivastava that as the award is joint and several and in such cases when the award is joint, the amount of compensation can be realised from any of the tort-feasors. But in case of composite negligence like this, the liability to pay compensation deserves to be specified. Counsel cited a decision of this Court in the case of Bisarti Bai v. MPSRTC (1990 ACJ 103). It is well-settled that in cases of composite negligence, liability cannot be apportioned, and the joint tort-feasors are jointly and severally liable. However, considering both the drivers are found equally responsible for the accident, it shall be proper to specify the amount to be paid by the MPSRTC and by the Insurance Company. Therefore, we direct, in the facts of this case, that the MPSRTC shall pay the amount of Rs. 1,00,000/- and interest thereon at the rate of 12% per annum from the date of the application till payment and the New India Insurance Company shall pay the same amount with interest at the rate of 12% per annum thereon. Both shall deposit the amount within a period of two months, of course, after adjustment of the amount, if any, already deposited, failing which the amount awarded shall carry interest at the rate of 18% per annum. While disbursing the amount so deposited, the Tribunal shall see that the amount is disbursed and/or deposited in accordance with the guidelines laid down by the Supreme Court in the case of General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, for protecting the interests of the minors.

17. In the result, the appeal is partly allowed as indicated above. However, the claimants shall be entitled to costs from the MPSRTC as also the Insurer. Counsel's fee, Rs. 1,000/-, if precertified.