

(1997) 05 OHC CK 0012
In the Orissa High Court
Case No : Misc. Appeal No. 692 of 1992

National Insurance Company Ltd.

APPELLANT

Vs

Kamala Moharana and Others

RESPONDENT

Date of Decision : 08-05-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (1998) ACJ 1036 : (1997) 2 OLR 189

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : S.D. Das, D. Samal, A.K. Nayak and B.N. Udgata, for the Appellant; B.P. Ray, M.R. Nayak, A.K. Dalai, A. Mohanty and C.R. Patnaik for respondents 1 to 6, for the Respondent

Judgement

A. Pasayat, J.—Award made by Third Motor Accident Claims Tribunal. Puri (in short, "Tribunal") is under challenge in this appeal u/s 173 of the Motor Vehicles Act, 1988 (in short, the "Act").

2. One Sikhar Maharana (hereinafter referred to as "deceased") lost his life in an automobile accident which took place on 4.4.1990. His legal representatives lodged a claim u/s 110-A of the Act claiming compensation of Rs. 2,43,220/-. Pranaya Kumar Moharathi (hereinafter referred to as owner") and National Insurance Company Ltd. (hereinafter referred to as the "insurer") were, impleaded as, parties; It was claimed that the deceased was working black-smith in S.E. Railway, Jatni and was drawing more than Rs. 2000/- as his pay and was contributing Rs. 2000/ for maintenance of the claimants. Tribunal on consideration of materials on record found that salary certificate reflected monthly emoluments to be Rs. 1970/- and age of the deceased to be around 50 years. It estimated monthly contribution at Rs. 1500/ and annual contribution at Rs. 18,000/-. Applying multiplier, of 8, entitlement of claimants was fixed at Rs. 1,44,000/- A sum of Rs. 10,000/- was added for loss of happy family life, consortium and a sum of Rs. 3000/- for funeral expenses. It was held that the

insurer was liable to indemnify as the vehicle was subject-matter of a valid policy.

3. An application has been filed by the insurer praying to accept a document as additional evidence. The document in question is stated to be a copy of Motor Vehicle Inspector's report, according to which the deceased was partially responsible for the accident. The accident took place in the year 1990. The document which is sought to be introduced is contemporaneous to the accident. The claim application was disposed of by Tribunal in September, 1992. Provision for production of additional evidence in Appellate Court is contained in Order XLE, Rule 27 of the Code of Civil Procedure, 1908 (in short, the "Code"). The clause (aa) has been inserted in this rule by the Amendment Act of 1976 to provide that additional evidence may be received by the Appellate Court if the appellant satisfies the Court that after the exercise of due diligence, such evidence was not within his knowledge or could not be produced when the appeal was decided against him. The rule refers primarily to cases where on examining the evidence as it stands some inherent lacuna or defect becomes apparent, and the Appellate Court itself requires certain evidence to be adduced in order to enable it to do justice between the parties. The rule is not intended to give a party a second opportunity of proving his case but to supply a defect in the existing evidence on the record. Order XLI, Rule 27 relates to taking of additional evidence in the Appellate Court. In the 27th Report an amendment had been recommended by the Law Commission in this rule in implementation of the recommendation made in the Fourteenth Report (Volume I page 405, para 45, second sub-paragraph). The object was to provide that additional evidence may be allowed by the Appellate Court, if the evidence could not be produced in the Lower Court because it was not within the knowledge etc. of the party seeking to produce it now. (Vide Fifty-fourth Report of Law Commission of India, page 300). Under Clause (aa) the Appellate Court must give its opinion in the order admitting evidence that the party intending to file the evidence notwithstanding the exercise of due diligence could not produce the document at the trial. Original Rule 27 consisted of two parts. The first part embraces a case in which the Trial Court has refused to admit evidence which ought to have been admitted and the second part relates to a case in which the Appellate Court requires additional evidence to be produced in order to enable it to come to a decision. Newly added clause (aa) provides a third category. For bringing its application, applicant has to establish that either the document was not within his knowledge or with due diligence could not produce the document. It has not been satisfactorily explained as to why the document in question was not placed before Tribunal and reason indicated to the effect that in spite of best effort the document could not be procured has no substance. No detail has been given as to what steps were taken to obtain it, and when it was obtained. Interestingly the affidavit in the application has been sworn to by the Advocate's Clerk and not any official of the insurer. Therefore, prayer for accepting additional evidence is rejected.

4. In support of the appeal, learned counsel for appellant urged that quantum as

fixed is high because contribution as taken is on the higher side. It is also submitted that default rate of interest as stipulated is not tenable. Mr. B.P. Ray for the claimants submitted that a fair assessment has been made of the income and contribution and no interference is called for.

5. As there is no dispute regarding monthly emoluments the core question is whether contribution as assessed and quantum as fixed is justified. Keeping in view the principles indicated by Apex Court in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, , quantum is fixed at Rs. 1,25,000/- While arriving at this figure I have taken note of appropriate multiplier to be adopted in view of age of the deceased, and possibility of increase in income, as the deceased had a few years to go before retirement. Quantum awarded for loss of consortium, and funeral expenses remain unaltered! In other words, amount payable is fixed at Rs. 1,36,000/-. Rate of interest shall be 9%. There can be, no stipulation of a default rate in view of the decision of this Court in Oriental Insurance Company Ltd. v. Harapriya, Nayak and Ors. 7994 (I) OLR 88. Out of the amount including interest, a sum of Rs. 30,000/- for each daughter, Rs. 25,660/- in the name of widow and Rs. 15,000/- in the name of minor children shall be kept in fixed deposit in any Nationalised Bank for a period of five years. Deposits for the children shall be renewed till the concerned child attains majority. No withdrawal shall be permitted against the amount to be kept in fixed deposit. However, on reasonable cause being shown justifying withdrawal, the Tribunal on being moved may pass appropriate orders. The balance amount after making fixed deposit shall be paid to the widow Kamala Moharana on being identified by any of the learned counsel appearing for her before the Tribunal. The amount shall be deposited before the Tribunal within two months from today if not already done Amount of statutory deposit made in this Court along with interest shall be permitted to be withdrawn by the Insurer on the deposit being made before the Tribunal, and certificate to that effect being filed before this Court.

The appeal is disposed of accordingly.