(2009) 07 MAD CK 0454

In the Madras High Court

Case No : C.M.A. No. 2139 of 2003

N.N. Swaminathan APPELLANT

Vs

Panthana Nachiar and Others RESPONDENT

Date of Decision : 06-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 149(2), 170

Citation : (2011) ACJ 1064

Hon'ble Judges : N. Kirubakaran, J

Bench : Single Bench

Advocate : Maheshwaran, for Prabhu Rajadurai, for the Appellant; Srinivasa Raghavan, for the Respondent

Judgement

N. Kirubakaran, J.—This civil miscellaneous appeal has been preferred by the owner of the insured vehicle as well as by the insurance company against the award of the Tribunal to the tune of Rs. 10,34,128 (rupees ten lakh thirty-four thousand one hundred and twenty-eight) as against the claim of Rs. 18,00,000 (rupees eighteen lakh).

2. At the outset, Mr. Srinivasa Raghavan, learned Counsel for the Respondents submitted that the appeal preferred by the insurance company is not maintainable in view of the absence of permission from the Tribunal u/s 170 of the Motor Vehicles Act and if at all, the owner alone is entitled to maintain this appeal. In support of the aforesaid contentions, he relied upon the judgment of Hon''ble Apex Court in Asha and Others Vs. United India Insurance Co. Ltd. and Another, and judgment of this Court in National Insurance Co. Ltd. v. T. Murugesan (2009) 1 TN MAC 160, another judgment in National Insurance Co. Ltd. v. K. Ampujam (2009) 1 TN MAC 166. In Asha v. United India Insurance Co. Ltd. (supra), the question before the Hon''ble Apex Court was that whether the joint appeal by the owner and the insurance company on defences not available u/s 149(2) of the Motor Vehicles Act is maintainable or not. The Hon''ble Apex

Court held that the joint appeal is maintainable after deletion of the name of the insurance company. Even otherwise, the insurance company can be transposed as Respondent. In the present case, the appeal is made by the owner as well as the insurance company. Relying upon the judgments quoted above, this Court transposes the insurance company as Respondent No. 4 in this appeal.

3. The case of the Respondent Nos. 1 to 3-claimants before the Tribunal was that deceased Suresh Kumar who was a teacher in a Panchayat Union Middle School, was travelling on his Yamaha motor cycle, on Manamadurai to Sivaganga Main Road near Samiyarpatti Vilakku on the left side of the road and the driver of the Appellant bus bearing registration No. TN 63-Y 9399, drove the bus in a rash and negligent manner and dashed against the head of the deceased and the deceased died on the spot. The deceased was earning about Rs. 7,063 (rupees seven thousand and sixty-three) as a monthly income. The Respondent No. 1 and the Respondent No. 2-claimants are the parents and the Respondent No. 3 herein is the brother of the deceased.

4. The insurance company, the transposed Respondent No. 4 herein contested the said M.C.O.P. contending that the accident occurred because of the negligence of the deceased and not because of the negligence of the driver of the insured vehicle.

5. The Respondent No. 2-claimant was examined as PW 1; one Shanmugham was examined as PW 2, Exh. P1 is the copy of F.I.R.; Exh. P2 is the certified copy of post-mortem; Exh. P3 is the certified copy of the Motor Vehicles Inspector''s Report; Exh. P4 is the certified copy of the charge-sheet; Exh. P5 is the pay certificate of the deceased Suresh Kumar and no one was examined on the side of the Appellant as well as Respondent No. 4 and no document was marked as exhibit on their side.

6. The Claims Tribunal after analysing the pleadings and evidence both oral and documentary, came to the conclusion, especially on relying upon PW 2''s evidence, that the accident could have been avoided if the driver of the bus had in careful manner driven the vehicle and the accident occurred due to rashness and negligence of the driver of the bus. Apart from that the Tribunal relied upon the Motor Vehicles Inspector''s Report, Exh. P3; charge-sheet, Exh. P4; against the driver of the bus, to come to the above said conclusion. The important portion of para 11 of the award dealing with negligence is extracted as follows:

(11) PW 2 has deposed evidence in the cross that accident road runs south to north. The victim was proceeding from south to north on his motorbike. PW 2 had denied that the accident happened due to rash and negligent driving of the deceased. It is from the evidence of PW 2 and the documents that would go to show that the victim was proceeding on his motor cycle near the place of the accident, the bus was proceeding from Sivaganga, that the bus driver could have listened the person driving the motor cycle in front of the bus. But, the driver of the bus did not see the person driving the motor cycle in front of him. If he could

have been driving the bus in a careful manner and slowly, then the accident could have been avoided and that it is due to rash and negligent driving of the driver of the bus, this accident has happened. This point is answered accordingly.

7. The Tribunal having come to the conclusion that the accident occurred due to rashness and negligence of the driver of the insured vehicle, proceeded to fix the quantum of compensation, on the basis of the monthly income of the deceased. The monthly income of the deceased has been proved by pay certificate of the deceased, Suresh Kumar, Exh. P5 and based on that monthly income was arrived at Rs. 8,000 (rupees eight thousand). The multiplier adopted by the Claims Tribunal was based on the age of the deceased who was 20 years at the time of accident and adopted the multiplier as ''16''. Totally, a sum of Rs. 10,34,128 (rupees ten lakh thirty-four thousand one hundred and twenty-eight only) was awarded as against the claim of Rs. 18,00,000 (rupees eighteen lakh). The said award is being challenged before this Court by the transport Corporation.

8. The learned Counsel for the Appellant Mr. Maheswaran, on behalf of Mr. Prabhu Rajadurai, contended that:

(i) Negligence was wrongly fixed on the driver of the insured vehicle and the finding in this regard is against the evidence on records, especially, PW 2. He relied upon the portion of the evidence to contend that the deceased was riding the vehicle behind the bus and the deceased only drove the vehicle in a rash and negligent manner hitting the rear side of the bus and that alone caused the accident. As a result, the deceased died because of the accident.

(ii) He further contended that in the award wrong multiplier ''16'' was adopted by the Tribunal taking into consideration the age of the deceased which was 20. According to the learned Counsel for the Appellant, the proper multiplier would be according to the age of the mother, which was 50, at the time of death. Hence, the proper multiplier would, according to the fact, be ''13''.

(iii) The next point canvassed by the learned Counsel for the Appellant is that since the deceased being a bachelor, 50 per cent should be deducted from the amount fixed as monthly income for his personal expenses. However, the Tribunal wrongly deducted one-third. In support of this contention and regarding the multiplier, the learned Counsel for the Appellant relied upon the judgment of the Hon''ble Supreme Court in Bilkish Vs. United India Insurance Co. Ltd. and Another, . In that case, the deceased was 20 years old bachelor and the age of the parents were 47 and 42. The Tribunal adopted multiplier ''11'' in view of the age of the claimants, that is, the parents and the said multiplier was confirmed by the High Court. On appeal, the Hon''ble Supreme Court reduced (sic enhanced) the multiplier from ''11'' to ''12''. In that case, the monthly income of the deceased was Rs. 31,494 (rupees thirty-one thousand four hundred and ninety-four). Considering those facts and circumstances peculiar to the facts of the case, the Hon''ble Supreme Court adopted multiplier as ''12''. The Hon''ble Supreme Court considered the parents'' age for finding the multiplier. Based upon the said judgment, the learned Counsel for Appellant vehemently argued that the age of the mother alone ought to have been taken into consideration. However, the Tribunal took the multiplier based upon the age of the deceased. He also cited another Hon''ble Supreme Court judgment in New India Assurance Company Ltd. Vs. Smt. Shanti Pathak and Others, , wherein on the age of the Appellants-claimants, the multiplier was adopted in that case.

(iv) Regarding the deduction of one-third from the monthly income towards personal expenses, the Appellant''s counsel submitted that it was wrongly done by the Tribunal as the deceased was a bachelor. According to him, 50 per cent should be deducted towards personal expenses. He relied on the decision in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, . The learned Counsel for the Appellant especially relied upon para 15 of the judgment wherein it has been stated that in regard to bachelor, normally 50 per cent is deducted for personal and living expenses. With regard to future prospects, the learned Counsel for the Appellant contended that the Tribunal already fixed the monthly income as Rs. 8,000 (rupees eight thousand) considering the future prospects also.

9. On the contrary, Mr. Srinivasa Raghavan, learned Counsel for the Respondents submitted that the negligence was rightly fixed on the driver of the Appellant based on the evidence and the same need not be interfered with. With regard to multiplier, he fairly conceded that for adopting the multiplier, the age of the claimants should be taken into consideration. The learned Counsel for the Respondents does not dispute the judgment cited by the learned Counsel for the Appellant in this regard.

10. Answering the point taken by the learned Counsel for the Appellant that the 50 per cent should be deducted from the income of a bachelor towards personal expenses, the learned Counsel for the Respondents relied upon the same judgment relied on by the Appellant''s counsel in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, Para 15 of the judgment, reads as follows:

However, where family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.

11. Put it in a nutshell, the learned Counsel for the Respondents supported the deduction of one-third from the monthly income towards personal expenses made by the Tribunal. As far as the future prospects is concerned, the learned Counsel contended that the Tribunal did not take the future prospects in proper perspective and did not arrive at the loss of income properly.

12. Learned Counsel for Respondents-claimants relied upon the Hon''ble Apex Court judgment in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, and especially relied upon

para 13 of the judgment. He submitted that 100 per cent of the present income should be taken as a future income and accordingly, the loss of income should be calculated. He also relied upon the Hon''ble Supreme Court judgment in Smt. Sarla Dixit and another Vs. Balwant Yadav and others, , to press the point that a formula be adopted in this type of cases, i.e., the present income (sic double of the present income is added to the present income and divided by 2) minus deduction of one-third will be the correct formula. He contended that the deceased was earning a sum of Rs. 7,063 (rupees seven thousand and sixty-three) which was proved by Exh. P5, the double of the amount of the salary comes about Rs. 14,126 (rupees fourteen thousand one hundred and twenty-six) and added together which comes about Rs. 21,189 (rupees twenty-one thousand one hundred and eighty-nine) Rs. 21,189 divided by 2 ? 12 comes to Rs. 1,27,134 (rupees one lakh twenty-seven thousand one hundred and thirty-four); adopting the multiplier of ''13'' it comes about Rs. 16,52,742 (rupees sixteen lakh fifty-two thousand seven hundred and forty-two). If one-third is deducted from the aforesaid amount, it yields Rs. 11,01,828 (rupees eleven lakh one thousand eight hundred and twenty-eight). According to him, the aforesaid amount would be the correct loss of income because of death of the deceased.

13. On perusal of the pleadings, evidence and records, it would go to show that there was contradiction in the pleadings as well as the evidence adduced by the Appellant in para 2 of the counter statement of the insurance company. In para 2 of the counter statement filed by the insurance company, it was stated that the bus was coming from back side of the deceased and all of a sudden, the deceased carelessly and negligently turned his motor cycle to his right and the accident happened.

14. On the contrary, the learned Counsel for the Appellant relying upon the evidence of PW 2, contended that the rider of the motor cycle (the deceased) was rash and negligent in riding his vehicle and dashed the rear side of the bus and hence, the accident occurred because of the negligence of the deceased. Whereas it is seen from the evidence as well as the pleadings that it was the bus driver who was rashly and negligently driving the vehicle and hit the deceased. In fact, charge-sheet, Exh. P4, proved that the driver of the insured vehicle alone was responsible for the accident. When that is the position, the Tribunal was right in concluding that the negligence was on the part of the driver of the insured vehicle and hence, it does not warrant any interference from this Court.

15. As far as multiplier is concerned, there is no dispute as it was conceded by the learned Counsel for the Respondents-claimants that the appropriate multiplier is based on the age of the claimants (mother). Therefore, the multiplier to be adopted is reduced from ''16'' to ''13''.

16. Regarding the deduction, the learned Counsel for the Appellant submitted that the deceased being a bachelor, 50 per cent should be deducted from the income of the deceased, whereas the learned Counsel for the Respondents contended that Tribunal rightly deducted one-third. A number of judgments have

been quoted to stress their respective points. However, the Hon''ble Supreme Court in its recent judgment in Oriental Insurance Co. Ltd. Vs. Deo Patodi and Others, , held that deduction of one-third towards personal expenses is ordinary rule in India. In that case, the Hon''ble Supreme Court after analysing various previous judgments of the Hon''ble Supreme Court, held as follows in para 14:

Indisputably, deduction of one-third for personal expenses is the ordinary rule in India. We think that in the facts and circumstances of the case, the same should be applied.

17. The earlier judgments of the Hon''ble Supreme Court in this regard are passed in Donat Louis Machado and Others Vs. L. Ravindra and Others, ; Fakeerappa and Another Vs. Karnataka Cement Pipe Factory and Others, ; Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, ; Bilkish Vs. United India Insurance Co. Ltd. and Another, ; MG. Dir., Bangalore Metropolitan Tpt. Corp. Vs. Sarojamma and Another, ; and finally New India Assurance Co. Ltd. Vs. Charlie and Another, .

18. In the aforesaid cases, one-third amount alone was deducted for a bachelor. Only and exception in this regard is passed by the Hon''ble Supreme Court in Syed Basheer Ahamed and Others Vs. Mohd. Jameel and Another, . In that case, 50 per cent was ordered to be deducted for the death of the bachelor. Considering the judgments referred to above, it would be appropriate and reasonable to deduct only one-third amount towards personal expenses of the deceased and to award two-third towards loss of income. Therefore, the award of the Tribunal in this regard is not disturbed and is maintained.

19. Towards loss of future prospects, the learned Counsel for the Appellant contended that the award was passed considering the future prospects also and that there need not be any more amount in this regard. Whereas the learned Counsel for the Respondents-claimants contended that the future prospects should be taken into account, especially the advancement in the field of education as a teacher is more. In support of that he relied upon the judgment of the Hon''ble Supreme Court passed in Smt. Sarla Dixit and another Vs. Balwant Yadav and others, , for the formula to be adopted for future prospects.

20. There are a number of judgments by the Hon''ble Supreme Court with regard to future prospects. The criteria for considering the future prospects is to arrive at the loss of income by the deceased.

21. The court cannot close its eyes and mechanically arrive and fix the amount while considering the future prospects of the deceased. In this regard this Court relied on the judgment of the Supreme Court in Andhra Pradesh State Road Trans. Corporation v. M. Ramadevi 2008 ACJ 930 (SC). In that case, even in the absence of appeal, enhancement was ordered.

22. Mr. Srinivasa Raghavan contended that even in the absence of cross-appeal/ appeal by the claimants, the compensation can be enhanced considering the

future prospects of the deceased. The formula adopted in Smt. Sarla Dixit and another Vs. Balwant Yadav and others, , can be safely adopted in this case also. Accordingly, the amount arrived following Sarla Dixit v. Balwant Yadav (supra) is followed and a sum of Rs. 11,01,828 (rupees eleven lakh one thousand eight hundred and twenty-eight) is arrived after the deduction of one-third towards personal expenses of the deceased.

23. For enhancing the award, learned Counsel for the Appellant objected that this Court cannot award any amount or enhance the amount in the absence of appeal/cross-appeal by the claimants.

24. The civil miscellaneous appeal is only the continuation of the original proceedings and this Court is only examining correctness of the award passed by the Tribunal. Invoking Order 41, Rule 33 of the Code of Civil Procedure, this Court can very well enhance or reduce the award even in the absence of any appeal/cross-appeal in this regard.

25. The view of this Court is supported by number of judgments including Tamil Nadu State Trans. Corporation v. Saroja (2008) 1 TN MAC 352 and Andhra Pradesh State Road Trans. Corporation v. M. Ramadevi 2008 ACJ 930 (SC). In a case Nagappa Vs. Gurudayal Singh and Others, , three-Judge Bench of the Hon''ble Apex Court held that even in the absence of the appeal, the appellate court can enhance the amount.

26. Learned Counsel for the Respondents contended that there was no amount awarded towards funeral expenses. Hence, a sum of Rs. 5,000 (rupees five thousand) is awarded towards funeral expenses. The learned Counsel for the Respondents contended that for loss of love and affection, a sum of Rs. 10,000 (rupees ten thousand) was awarded. The amount to be awarded by the Tribunal in toto should be fair and proper. As observed by the Hon''ble Apex Court, it should not be exorbitant or very low. It should not be arbitrary or unreasonable. Considering the case in toto and also considering the fact, the various amounts awarded on various headings, a sum of Rs. 10,000 (rupees ten thousand) awarded by the Tribunal is reasonable. Hence, it is maintained.

27. In view of the aforesaid judgments, the contention of the learned Counsel for the Appellant opposing the enhancement, is rejected.

28. The award of the Tribunal is modified as follows:

(i) For loss of income Rs. 11,01,828

(ii) For loss of love and affection Rs. 10,000

(iii) For funeral expenses Rs. 5,000

Total Rs. 11,16,828

29. Accordingly, the award is modified from Rs. 10,34,128 (rupees ten lakh thirty-four thousand one hundred and twenty-eight) to Rs. 11,16,828 (rupees eleven

lakh sixteen thousand eight hundred and twenty-eight). Consequently, appeal is disposed of in the above terms. No costs.

