

(2018) 08 GAU CK 0009
In the Gauhati High Court
Case No : MAC APPEAL No. 165 of 2010

Smti. Sthiti Sutradhar

APPELLANT

Vs

Sri Niren Mahanta

RESPONDENT

Date of Decision : 07-08-2018

Acts Referred:

Indian Succession Act, 1925 — Section 306

Motor Vehicles Act, 1988 — Section 142, 144, 155, 166, 166(1)

Citation : (2018) 08 GAU CK 0009

Hon'ble Judges : RUMI KUMARI PHUKAN, J

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

1. This appeal is preferred against the judgment and order dated 16.09.2009 passed by the learned Motor Accident Claims Tribunal, Kamrup at

Guwahati in MAC Case No.1089/2004 awarding compensation in favour of the claimant. After her death, her legal heir is substituted as appellant.

2. The question which has arisen in the appeal is, as to whether the legal heirs of the deceased claimant who sustained injury on the vehicular accident

and died a subsequently unconnected with the injury, sustained in the road accident, are entitled to continue the claim for compensation?

3. One deceased Sthiti Sutradhar (hereinafter referred as original claimant), on 02-022004 was travelling from Guwahati to Silchar by bus bearing

registration No.AS 01-P-0170. At about 2-30 PM while the bus reached at Akhiah village, on NH 44 ,the bus over turned due to rash and negligent

driving of the driver and as a result of the accident she sustained injuries all over the body including comminuted fracture of upper end of humerus of

right shoulder, dislocation of the right shoulder joint also. She preferred the claim

petition praying for compensation of Rs. 9,00,000/- on account of the injury sustained by her in the accident. It is stated that she is a businessman having income of Rs. 5,000/- per month and due to the accident she has lost her memory and 50% of her head remains senseless and she is unable to move her right hand. The claim petition was registered as MAC Case No. 1089/2004 u/s 166 MV Act.

4. Only the Respondent/ opposite party No. 3 the New India Assurance Co. Ltd. contested the case by filing written statement and others i.e. owner and driver did not contest the case.

5. The opposite party No. 3 who is the insurer of the vehicle No.AS 01-P-0170 in its written statement denied all the allegations and pleaded inter-alia

that the claim is excessive and they are not liable to pay any compensation if there any breach of policy condition specified in the policy.

6. On the pleadings and evidence on record learned Tribunal awarded an amount of Rs.69,000/- towards medical expenses and Rs.30,000/- for pain

and suffering. Being aggrieved and dissatisfied with the aforesaid award, the claimant preferred the appeal but the appellant/claimant died during the

pendency of the appeal and on the prayer so made, the legal heirs were substituted in the place of appellant. It is also not the case of the substituted

appellant that the claimant/appellant died due to the injury sustained in the accident.

7. Mr. B.K. Jain, learned counsel for the Learned counsel for the appellant has contended that when the injured dies, the question of grant of general

damages does not arise .But the legal representative is entitled to special damages such as medical expenses, actual loss of income, miscellaneous

expenses etc. Further submitted that though the claim regarding the pain and suffering, mental agony not survived on the death of injured but the loss

to the property is survived.

8. In support of his contention Mr. Jain has referred the citation Naseeban & Another vs.Surendra Paul & Others reported in AIR 1996 Rajasthan 91,

Jenabai Widow of Abdul Karim Musa & Others vs. Gujrat State Road Transport Corporation 1991(1)GLH 404. Surpal Singh Ladhubha Gohil vs.

Raliyarbahen Mohanbhai Savila & Ors 2009(2) GLH

9. Mr. Batra learned counsel for the Respondent No. 3 the New India Assurance Co. Ltd has submitted that in the present appeal the

injured/appellant has already expired. So in view of the provision of section 306 of the Indian Succession Act, 1925, the legal representative of the

deceased, who suffers personal injuries in a motor vehicle accident and who dies subsequently for some other reasons, cannot prosecute or continue

to prosecute an application for compensation under Sub-Section (1) of Section 166 of the MV Act, 1988, as the claim for personal injury abates

, except as regards the claim for pecuniary loss to the estate of the claimant that too on the pleadings and conclusive proof of the case. In that view of

the matter the appeal filed by the appellant/injured on her death being perused by the legal representatives does not survive and therefore abates. In

this regard Mr. Batra has referred the citation reported in AIR 2007 Madhya Pradesh-38 Smti Bhagabati Bie and Anr vs. Bablu and Ors.

10. Mr. Bhatra has submitted that in the case of S. Muniyappa vs. H.L.Narashimhaiah & Ors reported in AIR 1984 (Karnataka) 63 the Division

Bench of Karnataka High Court has held that appeal filed by the victim for enhancement of compensation does not survive on the death of the injured.

11. As stated above there is no dispute about the accident and the injuries suffered by the deceased appellant and that she died during the pendency of

the appeal and that the death of the claimant/injured has no relation with the accident. In such circumstance before going to the merit of the case, now

it is to be decided as to whether on the death of the injured appellant/claimant, the legal representative of the deceased appellant entitled for

enhancement of the award as claimed by the deceased appellant and the same is maintainable having regards to the provision contained in section 306

of the Indian Succession Act?

12. Submission of the learned counsel for the respondent Insurance Company is two fold-(1) that due to death of the appellant the claim for personal

injury abets except pecuniary loss to the estate of the claimant and (2) that on the death of the appellant the enhancement of compensation does not

survived as the same is abated.

13. In the case of S. Muniyappa vs. H. L. Narashimhaiah & Ors as referred above the deceased claimant had filed the appeal for enhancement of the

award but Division Bench of the Honâ??ble Karnataka High Court has dismissed the appeal on the ground that the appeal would not survive as the

appeal was instituted by the injured claimant himself for enhancement of

compensation and that right dies with him.

14. We all know that the Motor Vehicle Act is a beneficial piece of legislation. As provided by the provision of section 144 of the Motor Vehicle Act,

the provisions of chapter X of the Act shall have overriding effect of any other provision of this Act or law for the time being in force.

15. Again section 155 of the Act runs as follows- Effect of death on certain causes of actionâ?" Notwithstanding anything contained in section 306 of

the Indian Succession Act,1925(39 of 1925) the death of a person in whose favour a certificate of insurance had been issued ,if it occurs after the

happening of an event which has given rise to a claim under the provision of this Chapter, shall not be a bar to the survival of any cause of action

arising out of said event against his estate or against the insurer.

16. In view of the provision of section 155 of the MV Act , section 306 of the Indian Succession Act is applicable only to the death of a person in

whose favour a certificate of insurance had been issued ,if the death occurred after the happening of an event which has given rise to a claim under

the provision of this Chapter X or XII, shall not be a bar to the survival of any cause of action arising out of said event against his estate or against the

insurer. As such with due respect I am not agreeable with the view of Honâ??ble Karnataka High Court.

17. On the other hand in the case of Smti Bhagabati Bie and Anr. vs. Bablu and Or reported in AIR 2007 Madhya Pradesh-38 the full bench of

Honâ??ble Madhya Pradesh High Court held that a claim for personal injury filed under section 166 of the Motor Vehicle Act ,1988 would abate on

the death of the claimant and would not survive to his legal representatives except as regards the claim for pecuniary loss to the estate of the claimant.

18. In the case of Jenabai Widow of Abdul Karim Musa and others vs. Gujrat State Road Transport Corporation reported in 1991(1) G.L.H 404 the

Honâ??ble Gujrat High Court also held that 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 provision of Sec. 306 of the Indian

Succession Act.

19. In that view of the matter, the present appeal is maintainable only to the extent of pecuniary loss caused to the estate of the deceased Sthiti

Sutradhar.

20. Now the question is what is loss to the estate of the deceased?

Honâble Kerala High Court in the case of P.K. Omana Vs. Francis Edwin reported in 2011(4) KLT 952 discussed about the distinction between

âLoss to the Estateâ and âLoss of the Estateâ which also upheld by the Honâble Supreme Court in appeal in Civil Appeal No. (S) 8964 of

2012 Francis Edwin Vs. Omana P.K. & Ors. vide order dated 12.08.2016.

21. In the above referred judgment Honâble High Court has observed that capitalized value of the income spent on the dependents ,subject to

relevant deductions ,is the pecuniary loss sustained by the members of his family through his death. The capitalized value of his income, subject to

relevant deductions ,would be the loss caused to the estate by his death. In other words, what amount the dependents would have got less deductions

if any that could be made under law is the loss to the estate of the deceased, that goes to the legal heirs of the deceased.

22. In the present case the substituted appellant is not entitled to get enhancement of the award on the point of pain, shock and suffering, loss of

amenities of life etc. as these are not the loss caused to the estate of the deceased but loss of estate.

23. There is no dispute about the amount of Rs. 69,000/- spent on medical treatment of the original claimant but there is no supporting documents as

regards the amount of Rs. 15,000/- paid to the attendant and Rs. 20,000/- towards conveyance and the payments to the physiotherapist, as claimed by

the original claimant so the Ld. Tribunal provided no any award on the said save and except an amount of Rs. 30,000/only under head of pain and

sufferings.

24. In her claim case, the claimant has stated that she suffered permanent disability of 50% and exhibited one disability certificate as Ext.14.

According to P.W. 4 Dr. P.K. Padmapti who had issued the Ext. 14 certificate, the claimant had 50% permanent disability due to having pain and

restriction of movement of right shoulder joint with muscle weakness. Ext.14 was issued in 2005. According to P.W. 4 such disability is to be

reviewed after 3 years and he is not aware about the present condition of the claimant. While deciding the question of disability the learned Tribunal

has held that as the P.W. 4 is not aware about the present condition of the

injured as such it is difficult to say with certainty that the alleged disability is still continuing.

25. Accordingly the learned tribunal has observed that the disability of 50% in the given case will not come within the purview of the schedule 1 of the Compensation Act or Section 142 of the MV Act., but it can not necessarily be said that the petitioner has not suffered any disability at all. The learned tribunal has rightly arrived at a finding, that since the petitioner has not adduced any convincing evidence regarding her employment or income nor she has adduced any requisite evidence to show as to how far and to what extent her earning capacity has been effected for injury sustained in the accident.

26. In the case of Raj Kumar Vs. Ajay Kumar & 7 Anr. (2011) 1 SCC 343 the Honâ??ble Supreme Court observed that in case of permanent disability the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary;(ii) if the disablement is permanent ,whether it is permanent total disablement or permanent partial disablement,(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence ,it has to determine whether such permanent disability has affected or will affect his earning capacity.

27. Again observed that ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of permanent ability.

The second step is to ascertain his avocation ,profession and nature of work before the accident ,as also his age. The third step is to find out whether

(i) the claimant is totally disabled from earning any kind of livelihood, or (ii)

whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was early carrying on, or (iii) whether he/she was prevented or restricted from discharging previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn livelihood .

28. Regarding the disability certificate issued by the Doctor who did not treat the injured, the Honâ??ble Apex Court has observed that the Tribunal should also with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give â??ready to useâ?? disability certificates, without proper medical assessment.

29. The Honâ??ble supreme Court also summaries the principles as below-

(i) All injuries (or permanent disabilities arising from injuries),do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases ,where the Tribunal on the basis of evidence ,concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

30. In the present case the evidence of the claimant is silent about her business and the income and how her income is affected as a result of the accident. The P.W. 1 has simply deposed that she could not do her business since the date of accident till date. Her evidence is silent about the nature of business and about her income. So in the above circumstances I find that the

Tribunal has rightly held that, it is difficult to hold that the claimant sustained permanent disability and suffered any loss of earning capacity, for the alleged disability.

31. Now, the LCR reveals that the tribunal awarded the compensation in two head namely medical expenses and pain and suffering. But the record reveals that the that the she was treated at Down Town Hospital ,Guwahati, Civil Hospital, Shillong and Central Hospital, NF Railway as indoor patient as appears from ext. 3 to 7 as shown below :

Â Hospitalization

2.2.04 (DOA) : -- Khiehriat CHC, Jayabita Hill, Meghalaya -- Jowai State DispensaryÂ Â Â Â Â Â Â Â Â Â

(1 day) : 2.2.04-3.2.04 : -- Civil Hospital, Shillong

(13 days) : 3.02.04 : -- Maligaon Railway Hospital, Guwahati -- Discharged after conservative treatment

(3 day) 15.02.04 : -- Down Town Hospital,Guwahati (Discharged and operation as proposed could not be done as the claimant was suffering from porotitis)

(8 days) : 4.3.04 : -- Down Town Hospital, Ltd. to 11.03.04 for surgical Management 5.3.04- operation : right Shoulder joint Replacement Was done

(Ext.-6)

(8 days) 11.03.04 to : -- Railway Hospital, Maligaon 18.03.04

33 days Hospitalized : -- 5 times in span of 45 days

In hospital : -- 33 days

Operation on : -- 5.3.04 in Down Town Hospital for Right Shoulder Joint Replacement. Physiotherapy & Treatment 11.03.04 : Ext. 6 : Advise by

D/Tâ?"Exercise-active & assisted

05.04.04: Ext- 8 : Dr. Tamuly of Down Town, who operated on 05.03.04, advised after 1 month (05.04.04) to continue physiotherapy for shoulder

02.02.05 :Ext. 12: Dr. D.K Ghose-Advs Physiotherapy for 6 months. to

11.02.06. : Physiotherapy to continue

21.01.07 :Ext. 13 : Last date as per prescription of Dr. Sutradhar, who saw patient on 21.01.07 and gave heading on prescription as â??Care of

Replacement orthoplastyâ?? and recorded â?? heavy stiffness & serious pain.â??

32. The above document was not under challenge by the respondent and only the thing remain that the original claimant could not produce the

supporting documents regarding her follow-up treatment, like payment to the attendant as well as the physiotherapist conveyance, misc expenses etc.

However, in view of the nature of fracture injury she sustained followed by shoulder replacement, the claim that has been made by the original

claimant regarding certain payment towards such conveyance as well as attendant and physiotherapist cannot be denied. Because with such type of

grievous injury one has to be attendant constantly by the attendant and physiotherapist also engaged to remove such stiffness. The original claimant

might be under tremendous mental and physical agony for such sudden accident and her husband also lost his mental balance since after the

occurrence and remained untraced and with utter hardship she continue her treatment by borrowing money from her relatives thereby incurring huge

debt. Such a women died after all measury and her family members/ the legal heirs might have to bear all such impact of expenses. The medical

document also reflects that at least for 3 years deceased continued her treatment at different hospitals and 3 years is not a small span. The Lower

Court Record also reveals that the insurance company has not provided the amount of no fault liability of Rs. 25,000/- that was granted on 6.9.2007

which is now to be paid by the insurance company/respondent.

33. In the result, appeal is partly allowed. In addition to the earlier amounts, the appellants are entitled to following compensation.

1. Earlier expenses : Rs. 99,000/2. Misc. Expenses : Rs. 50,000/-

3. Conveyance etc. : Rs. 20,000/4. Payment to attendant including Physiotherapist : Rs. 50,000/-

5. Unpaid amount of no fault liability : Rs. 25,000/-

Total : Rs. 2,44,000/-

The amount of interest is enhanced to 9% in view of inflation due to the span of long period since the day of accident in the year 2004.

34. Return the LCR along with a copy of this judgment.