

(2011) 04 AP CK 0092

In the Andhra Pradesh High Court

Case No : M.A.C.M.A. No"s. 2676 and 3087 of 2009

Susheel Kumar Ezkiel and Another

APPELLANT

Vs

U. Rajasekhar and Another

RESPONDENT

Date of Decision : 30-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(11)
Fatal Accidents Act, 1855 — Section 1A
Motor Vehicles Act, 1988 — Section 140, 165(1), 166, 170

Citation : (2013) ACJ 839

Hon'ble Judges : G. Bhavani Prasad, J

Bench : Single Bench

Advocate : K.L.N. Rao, for the Appellant; A. Ramakrishna Reddy, for the Respondent

Final Decision : Dismissed

Judgement

G. Bhavani Prasad, J.—Both the civil miscellaneous appeals arise out of the same award dated 17.2.2009 in O.P. No. 538 of 2007 on the file of the Chairman, Motor Accidents Claims Tribunal-cum-V Additional Metropolitan Sessions Judge (Manila Court)-cum-XIX Additional Chief Judge, City Criminal Courts, Hyderabad. The factual background for these two appeals is that on 25.4.2005 at about 8.30 p.m. when John Maislamani was going for a walk near Naz Hotel, he was dashed against by motor cycle bearing No. AP 10-AE 5033 driven rashly and negligently. He was shifted to Railway Hospital, but succumbed to the injuries on 3.5.2005. The brother of the deceased and his wife were taking care of the deceased, brought him up and educated him and, therefore, the deceased was contributing his income entirely to the claimants. The claimants, therefore, sought for a compensation of Rs. 8,50,000 due to loss of dependency and future support.

2. While the owner of the motor cycle remained ex parte, the insurer denied the allegations of the claimants, denied any negligence on the part of the motorcyclist, denied any licence for the driver or any insurance coverage for the

vehicle and desired the claim to be negated. Permission u/s 170 of the Motor Vehicles Act, 1988 was obtained as per orders in I.A. No. 24 of 2009.

3. The Tribunal framed issues on the responsibility for the accident and entitlement of the claimants to compensation.

4. PWs 1 to 3 and RW 1 were examined and Exhs. A1 to A8 and B1 to B3 were marked during the inquiry.

5. The Tribunal rendered the impugned award, firstly, accepting the evidence of the eyewitness to the accident, PW 2, corroborated by the contents of first information report, Exh. A1; charge-sheet, Exh. A2; and inquest report, Exh. A4. The Tribunal referred to binding precedents from this court to accept the evidence of PW 2, though he was not cited in the charge-sheet and concluded that the accident occurred due to rashness and negligence in driving the motor cycle. The Tribunal considered the claimant No. 1 to be the legal representative of the deceased as brother, while the petitioner No. 2 was held to be not eligible to be considered as legal representative even if she was dependent on the earnings of the deceased, as the petitioner No. 1, her husband, was earning for himself as a pensioner. With reference to the quantum of compensation, the Tribunal considered the gross salary of Rs. 8,716, deductions of Rs. 2,527 and the net salary of Rs. 6,714 after not deducting the contribution to the provident fund and assessed the loss of dependency at Rs. 3,357 at 50 per cent of the net salary. The loss of annual dependency was considered Rs. 40,284 and applying a multiplier of 10 with reference to the age of the deceased, the Tribunal awarded Rs. 4,02,840 towards loss of future income, apart from Rs. 5,000 for loss of love and affection. The Tribunal refused to award any sum towards funeral expenses or loss to estate or any other heads of pecuniary and non-pecuniary damages and the compensation rounded off to Rs. 4,08,000 was directed to carry interest at 7 per cent per annum and proportionate costs. Accordingly, the claim of the petitioner No. 2 was dismissed and the claim of the petitioner No. 1 was allowed in part.

6. In M.A.C.M.A. No. 3087 of 2009, the insurer challenged the award contending that both the claimants were not dependent on the deceased and the claimant No. 1, being a government employee with an independent source of income, cannot be claimed to be the legal heir of the deceased. The appellant also contended that the Tribunal could not have assessed the contribution to the family at 2/3rd of the income, more so, when the elder brother and his family have independent source of income. The appellant also contended that the Second Schedule to the Motor Vehicles Act has no application in view of the annual income of the deceased being more than Rs. 40,000 and as per *Bhagwandas Vs. Mohd. Arif*, the appropriate multiplier would have been 5.63. The appellant also contended that the deceased himself contributed to the accident and compensation should have been reduced to the extent of the contributory negligence. Hence, the appellant desired the impugned award to be reversed.

7. In M.A.C.M.A. No. 2676 of 2009, the claimants questioned the dismissal of the claim of the claimant No. 2 and also not taking the entire sum of Rs. 8,716 as the monthly income and not considering 2/3rd of such income as the loss of dependency. They also claimed that the Tribunal should have awarded Rs. 15,000 towards loss to estate and interest at 9 per cent per annum and hence, they requested for grant of the remaining compensation claimed originally.

8. Mr. K.L.N. Rao, learned counsel for the appellants in M.A.C.M.A. No. 2676 of 2009, and Mr. A. Ramakrishna Reddy, learned standing counsel for the appellant in M.A.C.M.A. No. 3087 of 2009, are heard and none entered appearance for the owner of the offending vehicle like before the Tribunal.

9. The point that arises for consideration in these appeals is primarily the entitlement of the claimants to compensation and the quantum of compensation, if they are so entitled.

10. Though the claimants questioned the dismissal of the claim of the claimant No. 2 in M.A.C.M.A. No. 2676 of 2009, the feeble attempt during the submissions of Mr. K.L.N. Rao, learned counsel for the appellants therein, cannot succeed. The Tribunal has concluded as a matter of fact that the wife of the elder brother of the deceased, claimant No. 2, was dependent on the pensionary income of her husband for her sustenance and cannot, in any view, be considered to be either a dependant or a legal representative of the deceased within the scope of the beneficial provisions of the Motor Vehicles Act. That conclusion, therefore, should remain undisturbed in the absence of any material to the contrary on record.

11. Before referring to the factual controversy, the legal position as disclosed by the precedents cited by both sides needs to be first referred to.

12. The Motor Vehicles Act, 1988 provides for an application for compensation arising out of an accident of the nature specified in section 165(1), u/s 166, under which in the event of death resulting from the accident, the legal representatives of the deceased can apply for the benefit of all the legal representatives.

13. Earlier u/s 1-A of the Fatal Accidents Act, 1855, an action or suit for damages shall be only for the benefit of the wife, husband, parent and child of the deceased and the action or suit shall have to be brought by and in the name of the executor, administrator or the representative of the deceased. Section 166 of the Motor Vehicles Act, 1988 is, thus, an obvious expansion than the right of action or suit conferred by the Fatal Accidents Act and the term "legal representative" was not defined in the Act. If the definition of the term "legal representative" u/s 2(11) of the Code of Civil Procedure, 1908 were to be referred, the term means a person, who in law represents the estate of a deceased person and includes any person, who intermeddles with the estate of the deceased and the word "estate" has been referred to in the Law Lexicon as having a diversity of meaning and a variety of signification. It may be the property of every character and given the judicial understanding of the diverse

and wide meaning of the word "estate" and the expansion of the right of suit or action from the Fatal Accidents Act, 1855 to the Motor Vehicles Act, 1988, the term "legal representative" used in section 166 with particular reference to the definition of the term u/s 2(11) of the Code of Civil Procedure, ex facie, appears to bring the brother living together with the deceased to be capable of being interpreted as a legal representative.

14. In P.B. Kader and Others Vs. Thatchamma and Others, the claim was under the Fatal Accidents Act and under the Act, brothers and sisters are not entitled to rank as dependants. It was also observed that the death of a sole dependant has a deadly effect on the compensation claimable in many cases and courts will be in order in having due regard to them while deciding the appeal, provided the pleadings are got amended, the opposite party afforded an opportunity to answer and other procedural prescriptions complied with.

15. Similarly in Dewan Hari Chand and Others Vs. Municipal Corporation of Delhi and Another, the Fatal Accidents Act was referred to as well as the case of P.B. Kader and Others Vs. Thatchamma and Others, and section 1-A of the Fatal Accidents Act was considered as exhaustive excluding brothers and sisters from claiming compensation.

16. Similarly in Motilal Vishwakarma Vs. Guru Bachan Singh and Others, , considering section 1-A of the Fatal Accidents Act, 1855 and section 110-A of the Motor Vehicles Act, 1939, it was concluded that persons, who are neither heirs of the deceased nor are such persons as are mentioned in section 1-A of the Fatal Accidents Act, cannot be considered to be the legal representatives for the purpose of an action u/s 110-A. The brother of the deceased was held to be incapable of maintaining a claim for compensation.

17. Similar was the decision in Budha Vs. Union of India (UOI) and Others, wherein also it was opined that so far as the claim for compensation arising out of the death on account of a motor accident is concerned, the only person in whose favour a right accrues was considered to be one falling within the category of persons provided u/s 1-A of the Fatal Accidents Act. Section 2(11) of the CPC was considered not to confer any right and not to create any class of heirs. Brother and sister were, hence, held not entitled to claim compensation for themselves in respect of the death of a deceased in a motor accident.

18. In United India Insurance Company Limited Vs. M. Ramulu and others, , brothers and sisters were considered to be not dependants of the victim as the deceased had no liability in law to maintain them.

19. In Smt. T.S. Rukmani and Another Vs. M.B. Aiyappa and Others, even a major son who was self-reliant was held to be not entitled to be compensated for the loss of dependency as the deceased had no obligation in law to maintain him.

20. Similarly in Bontu Venkata Rao and Another Vs. Kalla Venkataramana and Another, the husband and children were considered to be not dependants and the

entitlement was considered to be only for the loss of service and consortium.

21. However in Gujarat State Road Transport Corporation, Ahmedabad Vs. Ramanbhai Prabhatbhai and Another, the Supreme Court considered the question in depth and concluded that the right given to the legal representatives under the Motor Vehicles Act to file an application for compensation for the death due to a motor vehicle accident is equally new and an enlarged one, which cannot be hedged in by all the limitations of an action under the Fatal Accidents Act, 1855. The Supreme Court referred to the cleavage of opinion between the High Courts in this regard and held that every legal representative who suffers on account of death of a person due to a motor vehicle accident should have a remedy for realization of compensation and in an Indian family, brothers, sisters and brothers' children and sometimes foster children live together and they are dependent upon the breadwinner of the family. The Supreme Court found no justification to deny them compensation relying upon the provisions of the Fatal Accidents Act, 1855 and held that the brother of a person who dies in a motor vehicle accident is entitled to maintain a petition u/s 110-A of the Act, if he is a legal representative of the deceased. The Apex Court also concluded that Parliament intended that the expression "legal representative" in section 110-A of the Act should be given a wider meaning and not confined to the spouse, parent and children of the deceased. The view taken by Gujarat High Court in this regard was upheld. This view was reiterated by the Apex Court in Smt. Manjuri Bera Vs. The Oriental Insurance Company Ltd. and Another, wherein it was held that even if there is no loss of dependency, the claimant, if he or she is a legal representative, will be entitled to compensation, the quantum of which shall be not less than the liability flowing from section 140 of the Motor Vehicles Act.

22. A Division Bench of this court also took a liberal view in The Chairman, A.P.S.R.T.C., Hyderabad Vs. Shafiya Khatoon and Others, and concluded that the dependency according to the liberal view accepted by them is to go to all the legal heirs of the deceased who died intestate.

23. The decision reiterated in Umed Chand Golcha Vs. Dayaram and Others, was also referred to show that the loss caused to the dependants should be assessed on the basis of the value of their dependency while the loss caused to the estate should be assessed on the basis of accretion which the deceased could have made to augment his estate or part thereof but for the accident. The decision dealt with the death of a claimant during the claim in the claim petition and held that the claim pertaining to the estate of the injured survives to the legal representatives.

24. Similarly, the principles for assessment of compensation laid down in Y. Varalakshmi and Others Vs. M. Nageswara Rao and Others, were also referred to.

25. In Mrs. Helen C. Rebello and Others Vs. Maharashtra State Road Transport Corpn. and Another, the Apex Court pointed out that the amounts which have no

correlation with the amount receivable under the statute occasioned only on account of the accidental death were considered not to come within the periphery of the Motor Vehicles Act and when the deceased contributed his own money for which he receives the amounts, the amounts cannot be deducted from out of the amount receivable under the Motor Vehicles Act. That was with reference to the amounts like life insurance amount, provident fund, etc.

26. Similarly, in *United India Insurance Co. Ltd. Vs. Patricia Jean Mahajan and Others Etc. Etc.*, also the question of deductions of such nature was similarly answered.

27. In *Dilip Kumar Moses Vs. V.J. Cyrice and Others*, , a learned Judge of this court held that the legal representatives are entitled to be compensated for the pecuniary loss to the deceased as well as the pecuniary loss to the members of the family of the deceased. Computation of damages under the pecuniary loss to estate includes loss of earnings, loss of personal property and loss of expectation of life, which includes the income of the deceased and his possible savings and legal representatives who are entitled to succeed to his estate are entitled to claim compensation towards loss to estate. However, the pecuniary loss depends on the actual dependency and the pecuniary benefit they were enjoying from the income of the deceased.

28. In *Pola Bhadramma Vs. G. Kumar and United India Insurance Company Ltd.*, a Division Bench of this court considered the compensation payable in fatal accident cases and injury cases and enumerated the various heads of damages that have to be awarded and the manner of awarding them.

29. *Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another*, exhaustively dealt with all the questions involved and held that in the absence of evidence to the contrary, brothers and sisters will not be considered as dependants because they will be either independent and earning or marry or be dependent on the father.

30. Therefore, notwithstanding the contrary views, in the *Gujarat State Road Transport Corporation, Ahmedabad Vs. Ramanbhai Prabhatbhai and Another*, and *Smt. Manjuri Bera Vs. The Oriental Insurance Company Ltd. and Another*, the brother of a person, who died in a motor vehicle accident, is entitled to maintain a petition under the Motor Vehicles Act, 1988 if he is a legal representative of the deceased. Claimant No. 1 can, therefore, maintain his claim for compensation, while the quantum of compensation to which he is entitled depends on the extent of his dependency, the extent of the loss of estate to the deceased to which the claimant No. 1 succeeded and other factors referred to in the precedents stated above.

31. Coming to the question whether the elder brother, claimant No. 1, also can claim to be a dependant/legal representative of the deceased for the purpose of claiming the compensation, the evidence of PW 1, claimant No. 1, before the Tribunal on oath is positive about the deceased being under his care and control

right from his student days and PW 1 taking care of the education of the deceased. He also stated about the deceased brother taking care of him at his old age of 60 years and contributing his entire income to the welfare of himself and his wife. During cross-examination by respondent No. 2, these claims were not subjected to any serious cross-examination. Though it is admitted that the PW 1 is a pensioner, the claimant No. 2 is admittedly unemployed and is a housewife. Evidence of RW 1 on behalf of the respondent No. 2 that the claimants were not dependent on the income of the deceased was not supported obviously by any personal knowledge nor by any document showing the quantum of pension which the claimant No. 1 was receiving to indicate such pension to be reasonably sufficient to meet the minimum needs of maintenance of both the claimants. Under the circumstances, the conclusion of the Tribunal that the claimant No. 1 can be considered to be a legal representative entitled to claim compensation from the owner and insurer of the vehicle needs no disturbance.

32. In *Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another*, and earlier, the Supreme Court, after elaborate consideration of all the questions that arise in such cases, opined that in the absence of evidence to the contrary, brothers and sisters will not be considered dependants because they will be independent or earning or married or be dependent upon the father. Therefore, the question whether any brothers and sisters will be dependants or not, depends on the evidence in each case and the uncontroverted version of PW 1 on oath before the Tribunal could not have been rejected by the Tribunal in any view.

33. If the claimant No. 1 aged 60 years reasonably expects to be mentally, physically and monetarily supported by his younger brother whom he has brought up, educated and looked after and who remained a bachelor till death, such expectancy and the loss suffered due to death cannot be considered to be not entitling him to claim compensation under the Motor Vehicles Act as a dependant under the circumstances.

34. However, insofar as the contribution of the deceased to the claimant No. 1 is concerned, *Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another*, finds the Apex Court laying down 50 per cent being deducted normally as personal and living expenses and Tribunal had in fact deducted half of the salary as personal expenditure of the deceased and counted the remaining half only to assess the compensation.

35. In assessing such income of the deceased from out of the gross salary of Rs. 8,716, only the deductions towards profession tax and group insurance to the tune of Rs. 130 could have been deducted by the Tribunal, but not the contributions towards the provident fund, repayment of festival advance and repayment of society loan. While the Tribunal rightly did not deduct the contribution towards the provident fund, it deducted the other two sums in assessing the salary and supposed loss to the claimant No. 1 and, therefore, the loss of monthly income should have been counted at Rs. 8,586 to the claimant No. 1. On such monthly income, the appropriate multiplier that could have been

adopted with reference to the age of claimant No. 1 only who could have received support for the rest of his life from his brother. Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , specifies the appropriate multiplier for a person of the age of 56 to 60 years as 9. If so, the total loss of dependency/future income for the claimant No. 1 would be Rs. 9,27,288 and if 50 per cent of the same were to be deducted for the personal expenses of the deceased, the loss sustained by the claimant No. 1 should be assessed at Rs. 4,63,644. Rs. 5,000 was awarded by the Tribunal towards loss of love and affection, which was not disputed in M.A.C.M.A. No. 3087 of 2009 and, therefore, the total compensation to which the claimant No. 1 would have been entitled comes to Rs. 4,68,644 which can be rounded off to Rs. 4,70,000.

36. While the Tribunal granted a compensation of Rs. 4,08,000, there should be, therefore, an enhancement of Rs. 62,000. The Tribunal awarded interest at 7 per cent per annum on the compensation awarded by it, which rate of interest can be reasonably adopted for the enhanced compensation also and the entire compensation should carry proportionate costs. Both the respondents will be liable jointly and severally to pay the compensation.

37. While so, a subsequent event has to be taken note of about the death of the claimant No. 1 on 11.3.2010. His death certificate has been filed by the learned counsel for the claimants along with a memo stating that the claimant No. 2 alone is the sole surviving legal representative of the deceased-claimant No. 1. The death of the claimant No. 1 during the pendency of the appeal makes no difference to the right of the claimant No. 2 to receive whatever compensation to which the claimant No. 1 was entitled under the award under appeal as enhanced herein. As the claim of the claimant No. 1 crystallized under the award much before the filing of the appeals, it is part of the estate of the deceased inherited by the claimant No. 2, and hence, she should be given the benefit of the award. Though she failed as the claimant No. 2 in her own right to seek compensation for the death of the deceased, she is, thus, entitled to receive the benefits of the award as the legal heir and legal representative of the deceased claimant No. 1. Accordingly, award dated 17.2.2009 in O.P. No. 538 of 2007 on "he file of the Motor Accidents Claims Tribunal-cum-V Additional Metropolitan Sessions Judge (Manila Court)-cum-XIX Additional Chief Judge, City Criminal Courts, Hyderabad, is modified by enhancing the compensation by a further sum of Rs. 62,000, i.e., granting total compensation of Rs. 4,70,000 with the same rate of interest with proportionate costs as granted by the impugned award. In view of the death of the claimant No. 1 during the pendency of the appeal, the claimant No. 2 being his sole legal heir and legal representative is recorded as such and is entitled to the benefits of the impugned award as modified by this judgment. M.A.C.M.A. No. 3087 of 2009 is dismissed without costs and M.A.C.M.A. No. 2676 of 2009 is allowed in part without costs accordingly.