
(1986) 09 KL CK 0020

In the High Court Of Kerala

Case No : M.F.A No's. 525 and 593 of 1981

United India Insurance Co. Ltd.

APPELLANT

Vs

Ratnamma and Others

RESPONDENT

Date of Decision : 12-09-1986

Acts Referred:

Kerala Torts (Miscellaneous Provisions) Act, 1976 — Section 2, 9(3)
Motor Vehicles Act, 1988 — Section 110A, 110C
Succession Act, 1925 — Section 306

Citation : (1986) 09 KL CK 0020

Hon'ble Judges : V. Sivaraman Nair, J;K. John Mathew, J

Bench : Division Bench

Advocate : S. Parameswaran, R. Nithyanandan and S. Ramachandran, for the Appellant; M.N. Sukumaran Nair, for the Respondent

Final Decision : Dismissed

Judgement

K. John Mathew, J.—These appeals arise from M.V.O.P. No. 207 of 1979 before the Motor Accidents Claims Tribunal, Ernakulam. The 3rd Respondent is the Appellant in the first of these appeals and the Petitioners- hereinafter referred to as the Petitioners-are the Appellants in the other appeal. The 1st Petitioner is the mother and the 2nd Petitioner is the widow and the 3rd Petitioner is the son of deceased Sivasankara Pillai, who died in a motor accident involving lorry KLQ 6.101, belonging to the 1st Respondent, before the Tribunal, which was driven by the 2nd Respondent, who was a paid employee of the 1st Respondent. The accident occurred on 6.11.1976. The Petitioners filed this petition, which was originally numbered as M.V.O.P. No. 95 of 1977, before the District Court, Ernakulam. It was transferred to the Motor Accidents Claims Tribunal after its constitution and renumbered as O.P. No. 207 of 1979. The Tribunal awarded Rs. 50,000/- as compensation and directed the 3rd Respondent to pay that amount to the Petitioners.

2. On behalf of the 3rd Respondent it was submitted that there was collusion

between the 1st Respondent and the Petitioners and therefore the Tribunal ought to have allowed the 3rd Respondent to take up all defences available to the 1st Respondent. It was further contended that the accident occurred due to the negligence and rashness of the deceased, who was riding a cycle at the time of the accident. It was further submitted that the 2nd Respondent, who was the driver, died and therefore the cause of action came to an end and therefore the claim petition was not maintainable. The 3rd Respondent is also challenging the quantum of compensation awarded. However, in the other appeal the Petitioners are praying for enhancement of the compensation awarded. According to them, the full amount claimed ought to have been granted.

3. Therefore, the points to be decided are:

(1) Whether the cause of action has abated? and

(2) Whether any modification in the quantum awarded is necessary?

4. The claim was originally filed on 31.1.1977 before the District Court, Ernakulam. Respondents entered appearance. On 30.5.1979 it was reported that the 2nd Respondent died. The court ordered that the Petitioners will apply to implead the legal representatives of deceased 2nd Respondent and posted the petition to 6.8.1979. On that date it was adjourned to 29.10.1979. However, on 21.8.1979 the petition was transmitted to Claims Tribunal, Ernakulam as per the direction of the High Court dated 8.8.1979. It was posted before the Tribunal on 3.12.1980. Thereafter, the petition was enquired into and disposed of and apparently nobody noticed that the legal representatives of deceased 2nd Respondent were not impleaded.

5. On these facts learned Counsel for 3rd Respondent submitted that the claim abated by the death of the 2nd Respondent. However, learned Counsel for the Petitioners referred to Torts (Miscellaneous Provisions) Act, 1977. u/s 2 of that Act, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against or as the case may be for the benefit of his estate. That Act came into force on 1.3.1977. By Section 9(3) of that Act, Section 306 of the Indian Succession Act, so far as it relates to rights of action in torts, was made inapplicable to the State of Kerala. Learned Counsel further submitted that the general principles of abatement are not applicable in this case, since the owner and driver are joint tortfeasors.

6. In *New Suraj Transport Co. v. Ruby General Ins. Co.* 1972 ACJ 416 (P&U), Rajindra Nath Mittal, J. of the Punjab & Haryana High Court held that in case any person who has filed a claim u/s 110-A of the Motor Vehicles Act dies, the proceedings do not abate since such a claim is filed in a representative capacity. However, the same learned Judge distinguished that judgment in *Oriental Fire and Genl Ins. Co. Ltd. v. Raja Ram Gupta* 1974 ACJ143 (P&H) and held that on the death of the insured if his legal representatives are not brought on record, the general principles of abatement are applicable in proceedings for recovery of compensation under the Motor Vehicles Act. The Andhra Pradesh High Court has

also in *C. Jayaprakash v. State of Andhra Pradesh*, 1976 ACJ 492 (AP), held that on the death of the wrongdoer the suit will abate. In *State of Punjab v. V.K. Kalia* 1968 ACJ 401 (P&H), Sarkaria, J., as he then was, held that there is no absolute liability to pay compensation and only when negligence of the driver is proved, compensation is payable by the owner or the insurer. Relying on these decisions the contention of the learned Counsel for the third Respondent is that the claim for compensation abated by the death of the 2nd Respondent.

7. In *Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury*, , the Supreme Court held as follows:

...But a claim for rendition of account is not a personal claim. It is not extinguished because the party who claims an account, the party who is called upon to account dies. The maxim *actio personalis moritur cum persona*, a personal action dies with the person, has limited application. It operates in a limited class of actions *ex delicto* such as actions for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory.

Reference was also made to the following passage in Winfield & Jolowicz on Tort, 11th Edition, page 576:

The theoretical basis of the rule that a master is liable for the torts of his servants committed in the course of their employment for long caused controversy. As we have seen, so long as the liability was thought to depend on the fact that the master had, expressly or impliedly, authorised the servant's tort it was at least theoretically a primary one. The master was himself guilty of a tort against the Plaintiff.

8. In *Vanguard Fire and General Insurance Co. Ltd. Vs. Sarla Devi and Others*, , the Punjab High Court considered a contention that the driver was primarily responsible for the accident and therefore suit for damages was not maintainable in his absence. After referring to several authorities the court held that the owner and driver are joint tortfeasors and therefore absence of one of them will not be a bar for a suit for compensation. A similar view was taken by the Madhya Pradesh High Court in *S. Chatterji Vs. Dr. T.B. Sarwate and Others*, . In *Badri Narain Prasad Vs. Anil Kumar Gupta and Another*, , a Bench of the Patna High Court also held that liability of the owner, driver and insurance company is joint and several and a claim application against the owner without joining the driver is maintainable.

9. The rulings relied on by the 3rd Respondent do not consider the question of joint liability of the owner and the driver. The main approach made in those decisions seems that negligence on the part of the driver has to be established in order to make the owner liable and that such negligence can be established only if the driver is also a party. The main reasoning in the rulings on which the Petitioners rely is that the driver and the owner are joint tortfeasors and their

liability is joint and several. We think that the latter view is to be preferred especially in view of the provisions of Sections 110-A to 110-C of the Motor Vehicles Act under which the owner and driver are jointly and severally liable. This does not mean that the negligence of the driver need not be proved. Even in the absence of the driver evidence regarding the negligence of the driver can be adduced. Take for example, a case where the driver also died in the accident without leaving any legal representative. That will not preclude the injured from claiming compensation against the owner or the insurer. We hold that the owner and driver are joint tortfeasors, whose liability is joint and several. Each may be sued alone or jointly and each will be liable for the whole damage.

10. In this case the Tribunal has examined whether the driver was negligent Exh. A-5 is the scene mahazar which shows that there was a mark near the scene of occurrence and the tar became loose. The glass pieces which were red in colour affixed to the back of the cycle were scattered at the scene of occurrence. There was a clear vision to a distance of 150 metres towards west. Moreover, the eyewitness who was examined as PW 2 stated that the lorry was coming from the east and the cycle was also coming from east to west. There was no other vehicle at the time of the accident. The lorry was driven at a very great speed, and was attempting to overtake the cycle from behind. Such overtaking is dangerous at that spot There is no evidence on the part of the Respondents to prove that the driver was careful. Under these circumstances we see no illegality in the finding of the Tribunal that the driver was negligent and the accident occurred due to the rash and negligent driving of the vehicle. So the first point is found against the 3rd Respondent

11. At the time of examination of PW 1, who is the widow of the deceased, the father of the deceased was alive. She has stated that the deceased was getting Rs. 600/- per month and he was giving the entire amount to her for their expenses. He was aged 29 at the time of his death. He could have continued to earn money till his retirement and even thereafter. The Tribunal has noticed that the deceased was entitled to enhancement in emoluments as time passes. The Tribunal deducted 1/3rd of the salary for his own expenses and applied only IS years" multiplier since he was to retire at the age of 58. No deduction for future vagaries is made since the advantages the deceased could have obtained were not taken into account An amount of Rs. 22,000/- was deducted for lump sum payment Accordingly, the Tribunal fixed Rs. 50,000/- as compensation. Under the circumstances of this case we think that the approach of the Tribunal is quite fair and reasonable. There is no justification to modify the award. The Tribunal has also provided for preserving the share due to the minor. Under the circumstances there is no merit in these appeals. Accordingly, the appeals are dismissed. However, there will be no order as to costs.