
(2003) 10 KAR CK 0089
In the Karnataka High Court
Case No : M.F.A. No. 2668 of 2001

Zareen Bega

APPELLANT

Vs

New India Assurance Co. Ltd. and Others

RESPONDENT

Date of Decision : 06-10-2003

Acts Referred:

Motor Vehicles Act, 1988 — Section 173

Citation : (2004) ACJ 1148 : (2003) 4 KCCR 354 SN

Hon'ble Judges : S.R. Nayak, J; Ram Mohan Reddy, J

Bench : Division Bench

Advocate : Shashidhar S. Karamadi, for the Appellant; A.M. Venkatesh, for the Respondent

Judgement

S.R. Nayak, J.—The appellant is the mother of the deceased and she has preferred this appeal u/s 173 of the Motor Vehicles Act, 1988 (for short, "the Act") calling in question the correctness and legality of the judgment and award dated 13.12.2000 in M.V.C. No. 3064 of 1996 on the file of the Motor Accidents Claims Tribunal and Additional Judge, Court of Small Causes, Bangalore City (SCCH-5), for short "the M.A.C.T.

2. The facts of the case in brief are as follows: On 24.6.1993 the deceased Naseer Khan by name, was driving lorry bearing registration No. CAA 6286 along with Yosuffa Pasha, the cleaner, on Bangalore-Pune National Highway. At about 11.30 p.m., when the said vehicle was moving 9 km. away from Ranebennur, lorry bearing the registration No. MH 17-6731 came from the opposite direction in a most rash and negligent manner and dashed against the lorry driven by the deceased and as a result Naseer Khan sustained grievous injuries and ultimately succumbed to those injuries on 25.6.1993. Appellant-claimant claiming that the deceased was earning monthly salary of Rs. 3,000/- and was aged 24 years, claimed total compensation of Rs. 30,00,000/- on various heads.

3. Although the respondents, namely, the owner of the motor vehicle involved in the accident and the insurance company though served with notice, did not

choose to contest the claim petition by filing any counter-statement, though the insurance company had put in appearance through its counsel.

4. On the basis of the pleadings, the M.A.C.T. framed the following points for decision-making:

"(1) Whether the petitioner proves that due to actionable negligence of driver of lorry bearing No. MH 17-6731 by its driver, her son Naseer Khan died in an accident?

(2) Whether the petitioner is entitled to compensation? If so, how much and from whom?

(3) What order?"

5. On behalf of the appellant-claimant, she examined herself as PW 1 and examined the cleaner of the vehicle driven by the deceased as PW 2 and got marked 10 documents as Exhs. P-I to P-10. On behalf of the respondents, none was examined nor any document was produced.

6. The M.A.C.T. on appreciation of the oral and documentary evidence came to the conclusion that the accident took place due to rash and negligent driving by the drivers of both the vehicles. The M.A.C.T. so opining, apportioned the blame equally between the two drivers.

7. The M.A.C.T. assessed the monthly income of the deceased at Rs. 3,000/- and deducting 50 per cent of that income towards personal expenses of the deceased, determined loss of monthly dependency at Rs. 1,500/- and applied multiplier of 17 and thus determined total loss of dependency in a sum of Rs. 3,06,000/-. To this, the M.A.C.T. added Rs. 15,000/- towards loss of expectancy, Rs. 5,000/- towards cost of transportation of the body of the deceased from Davangere to Bangalore and funeral expenses and Rs. 5,000/- towards medical expenses. Deducting 50 per cent of the aggregate towards contributory negligence, the M.A.C.T. has awarded total compensation of Rs. 1,70,500/- (Sic. Rs. 1,65,500/-) with interest at 9 per cent from 5.10.1996, that is, the date on which the claim petition was received by the M.A.C.T. from the M.A.C.T., Ranebennur. Hence, this appeal by the aggrieved claimant calling in question the finding recorded by the M.A.C.T. with regard to actionable negligence as well as quantum of compensation.

8. We have heard Mr. Shashidhar S. Karamadi, learned counsel for the appellant and the learned Standing Counsel for the insurance company and perused the judgment. The lower court records are also placed before us. We have perused the same. It is contended by Mr. Karamadi that the M.A.C.T. has seriously erred in law in holding that the deceased has also contributed negligence for causing the accident. According to Mr. Karamadi, such finding could not have been recorded by the M.A.C.T. on the face of the evidence of PW 2, which remains uncontroverted. Mr. Karamadi would next contend that the quantum of compensation awarded by the M.A.C.T. is not just and reasonable. According to

Mr. Karamadi, the M.A.C.T. ought not to have deducted 50 per cent of the income of the deceased for personal expenses and it ought to have deducted only 1/3rd of the income of the deceased. Mr. Karamadi would also maintain that the compensation awarded by the M.A.C.T. under the conventional heads are also on the lower side and they are required to be enhanced appropriately. Learned Standing Counsel for the insurance company, on the other hand, at the threshold, would point out that the M.A.C.T. has wrongly applied the multiplier and having regard to the age of the appellant mother on the date of the accident, the appropriate multiplier to be applied is 14 and not 17. Learned Standing Counsel would also contend that no exception could be taken for deduction of 50 per cent of the income towards personal expenses because deceased was a bachelor and he has left behind only the appellant mother and did not have any other responsibility to support any other member of the family.

9. Having heard learned counsel for the parties, two questions arise for decision-making. They are:

(1) Whether the finding recorded by the M.A.C.T. that accident took place on account of contribution of negligence by both the drivers is justified?

(2) Whether the compensation awarded by the M.A.C.T. in the facts and circumstances of the case and evidence on record could be regarded as a "just" compensation within the contemplation of the Act?

Point No. 1:

10. It is true that the onus to discharge actionable negligence on the part of the driver of the lorry bearing registration No. MH 17-6731 is on the claimant. The question is whether that onus is discharged by the appellant-claimant. In our considered opinion, the appellant has discharged that onus quite satisfactorily. PW 2 is an independent eyewitness. PW 2 in his evidence has stated thus:

"On 24.6.1993 I was working as cleaner in a lorry bearing No. CAA 6286. On that day the said lorry was proceeding from Bangalore to Bombay. At about 11.30 p.m. when the said lorry reached 10 km, behind Ranebennur, another lorry bearing No. MH 17-6731 came from the opposite direction and dashed against our vehicle. One Naseer Khan was driving our lorry. He sustained injuries and he was shifted to Ranebennur Hospital, again he was shifted to Davangere Hospital. Thereafter he died. I lodged a complaint with Ranebennur Police Station.

(2) Due to negligence of lorry driver bearing No. MH 17-6731 the accident took place."

11. PW 2 is not cross-examined by the respondents. In other words, the evidence of PW 2 remains uncontroverted. If we go by the evidence of PW 2, it is quite clear that the accident occurred solely due to rash and negligent driving of the lorry bearing the registration No. MH 17-6731 by its driver. However, the M.A.C.T. has attributed contributory negligence to the deceased also solely on the ground that according to the police records, deceased was also partly

responsible in causing the accident. What PW "2 has stated on oath before the court is a legal evidence whereas the police records cannot be considered as a piece of substantial legal evidence because the author or the custodian of the police records was not examined before the M.A.C.T. and the appellant had no opportunity to cross-examine him. Be that as it may, there is no necessity for us to dilate on this aspect because, admittedly, both the respondents did not file statement of objections to the claim petition. They have also not cross-examined PW 2 and there is absolutely nothing on record on the basis of which we can doubt the integrity of the oral testimony of PW 2.

12. Very recently, a Division Bench of this court, in the case of M.N. Rajan v. Konnali Khalid Haji, 2004 ACJ 484 (Karnataka), had to deal with the pleading requirement, on whom the burden of proof is placed and standard of proof expected to establish "contributory negligence". The Bench, speaking through one of us (S.R. Nayak, J.) held thus:

"(21) We also do not find any merit in the alternative contention of the learned counsel for the owner and the insurer of the lorry that at the worst, it is a case of contributory negligence and, therefore, the liability to pay the entire compensation cannot be fastened on the owner and the insurer of the lorry. In the first place, it needs to be noticed that the plea of contributory negligence is not taken in the written statement filed by the respondent No. 2, insurance company. The respondent Nos. 1 and 3 did not file the written statements at all. In the case of Pandian Roadways Corporation v. Karunanithi 1982 ACJ 186, it is held that the plea of contributory negligence should be taken in the written statement before the Claims Tribunal. Furthermore, in the case of Yatayat Nigam, Udaipur v. Union of India 1983 ACJ 312 (Rajasthan), it is held that where negligence of plaintiff's bus driver was not pleaded by the defendant, no issue was framed by the trial court covering contributory negligence and no evidence was led, Rajasthan High Court took an exception to the judgment of the appellate court in making out a new case with regard to contributory negligence."

13. The existence of a duty of care is essential to a cause of action for negligence, but for contributory negligence it is quite unnecessary that the claimant should owe a duty to the respondent. All that is required is that the claimant should have failed to take reasonable care for his own safety. In Winfield and Jolowicz on Tort, 12th Edn., the learned authors speaking about "standard of care" state thus:

"The standard of care expected of the plaintiff is in general the same as that in negligence itself and is in the same sense objective and impersonal, though some concession is made towards children and probably towards other persons suffering from some infirmity or disability rendering them unable to come up to the normal standard. Putting aside such exceptional cases, a "person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless".

The degree of want of care which will constitute contributory negligence varies with the circumstances: the law certainly does not require the plaintiff to proceed on his way like a timorous fugitive constantly looking over his shoulder for threats from others."

14. A Division Bench of this court in the case of General Manager, Bangalore Transport Service v. N. Narasimhiah 1976 ACJ 379, held as follows:

"If it is found that the negligent act of omission of a driver was the proximate and efficient cause of an accident, it will not be a valid defence to say that the person injured was also negligent unless it is shown that the person injured had made it extremely difficult for the other to avoid the accident. In this case the evidence of the witness referred to above clearly establishes that Raju was riding the cycle alone when the bus came from behind and dashed against the cycle. The evidence of the driver of the bus, if scrutinized carefully, clearly goes to show that he did not see at all how the accident happened. It is only after he heard the sound he stopped the bus. Therefore, his story that it was due to negligence of Raju the accident happened cannot be believed. A person driving a motor vehicle on a busy road like the one in question must drive the vehicle with reasonable care strictly observing the traffic regulations and the rules of the road so as not to imperil the safety of other persons whether they are pedestrians or cyclists or others who have a similar right to use the highways on which he drives it."

15. It is well settled that the burden of establishing the defence of contributory negligence is on the defendant who admits that on account of the conduct of the plaintiff, his negligence had gone into the background and it was the conduct of the plaintiff that resulted in the accident; it is not for claimant to disprove it. In the case of Sharada Bai v. Karnataka State Road Transport Corporation 1988 ACJ 490 (Karnataka), speaking about the burden of proving contributory negligence, the court held:

"The burden of proving contributory negligence is on the cross-objectors in this case. It is not for the appellant to disprove it. If the tortfeasor's negligence or breach of duty is established as causative of the damage, the onus is on him to establish that the victim's contributory negligence was a substantial or cooperating cause. In order to establish the defence of contributory negligence the propounder of that defence must prove, first, that the victim failed to take reasonable care of himself or, in other words, such care as a man of ordinary prudence would have done and that was a contributory cause of the accident. The amount of care which a person could reasonably be expected to take, must vary with the circumstances and the conditions actually prevailing at the material point of time. However, it is relevant to note that, in order to discharge the burden of proof, it is unnecessary for the propounder of that defence to adduce evidence about the matter. Contributory negligence can be and is very often inferred from the evidence adduced already on the claimants' behalf or from the perceptive facts, either admitted or found established, on a balance of

probabilities in the case."

16. The question whether an injured/a deceased also contributed negligence for causing accident is indisputably a question of fact and, therefore, if a defendant wants to take plea of contributory negligence as a defence, that plea should find a place in his pleading. In the present case, in the written statement filed by respondent Nos. 2 and 3, "contributory negligence" on the part of the deceased is not pleaded. The stock of defence of respondent Nos. 2 and 3 as reflected in the written statement is that the deceased died on account of his own rash and negligent driving of the motor vehicle. No issue with regard to "contributory negligence" is framed by the M.A.C.T. nor the respondent Nos. 2 and 3 adduced any evidence in support of the plea of "contributory negligence". Even before us, it is not the contention of learned Standing Counsel for respondent Nos. 2 and 3 that the deceased also contributed negligence for causing accident. Generally speaking, "contributory negligence" on the part of the injured/deceased cannot be inferred on the basis of the evidence on the record, if no such plea is taken in the pleading of the defendant. A Constitution Bench of the Supreme Court in *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, , while disapproving a finding of "a de facto agency" recorded by the Allahabad High Court, which was neither setup nor was the subject-matter of an issue, reiterated well recognised principle that "no amount of evidence could be looked into on a case not really setup".

17. In the premise of the above legal position, we do not think that the M.A.C.T. was justified in attributing contributory negligence to the deceased also in causing the accident. Consequently, we cannot sustain the finding of the M.A.C.T. insofar as it has attributed contributory negligence to the deceased.

Point No. 2:

18. The status of the deceased is not in controversy. He was a qualified driver driving heavy vehicles from Bangalore to Pune on national highway. The accident took place on 24.6.1993 and the deceased died on 25.6.1993. It cannot be said that in the year 1993, the deceased being a qualified driver with necessary licence to drive heavy motor vehicle, his earning a sum of Rs. 100/- per day as wage is not quite reasonable. The deceased died at a quite young age. It is not that deceased would have earned only Rs. 100/- throughout his future life. Be that as it may, we do not find any error on the part of the M.A.C.T. in taking the monthly income of the deceased at Rs. 3,000/-.

19. There is no hard and fast rule that in case of bachelors, necessarily 50 per cent deduction should be made towards personal expenses. What should be reasonable percentage of deduction towards personal expenses in a given case depends upon facts and circumstances of that case. Here is a case where, admittedly, the deceased left behind his mother and he did not have any younger brother or sister to support. It has also come in the evidence that the father of the deceased was residing separately. That means, the deceased was not

supporting his father. Having taken these aspects into consideration cumulatively, we are of the opinion that the M.A.C.T. is justified in taking 50 per cent of the income of the deceased towards his personal expenses.

20. We find force in the contention of learned Standing Counsel for the insurance company that the multiplier of 17 applied by the M.A.C.T. for determining loss of dependency is erroneous. It could be seen from the records that on the date of the accident and death of the deceased, the appellant was aged 39 years and, therefore, the appropriate multiplier is 14 and not 17. Therefore, the appellant-claimant will be entitled to a sum of Rs. 2,52,000/- (Rs. 1,500 x 12 x 14) towards loss of dependency.

21. We are also of considered opinion that the compensation awarded towards cost of transportation and funeral expenses and under the conventional heads of loss of expectation of life and loss to the estate are on lower side. The M.A.C.T. ought to have awarded reasonable compensation under the head of "loss of filial love". After the deceased had expired in Davangere Hospital, his body had to be removed from Davangere to Bangalore. In that view of the matter, we think that a sum of Rs. 10,000/- towards cost of transportation and funeral expenses would meet the ends of justice. We award Rs. 25,000/- towards loss to the estate and Rs. 20,000/- towards loss of filial love. We do not find any good reason to enhance compensation towards medical expenses and what has been awarded by the M.A.C.T. is just and proper.

22. In the result and for the foregoing reasons, we allow the appeal in part with costs and in substitution of the impugned award, we award total compensation of Rs. 3,12,000/- (rupees three lakh twelve thousand only) under the following heads:

(i) Loss of dependency Rs. 2,52,000/- (ii) Cost of transportation of body and funeral expenses Rs. 10,000/- (iii) Loss to estate Rs. 25,000/- (iv) Loss of filial love Rs. 20,000/- (v) Medical expenses Rs. 5,000/- ----- Total Rs. 3,12,000/- -----

with interest at 9 per cent from 20.12.1993 which is the date of the claim petition till realisation.

The advocate fee is fixed at Rs. 1,500/-.