

K Yellappa Vs. N Manju

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Court : Karnataka

Decided On : Jul-13-2018

Judge : S Sunil Dutt Yadav

Appeal No. : MFA 1917/2015

Appellant : K Yellappa

Respondent : N Manju

Judgement :

1 R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE13H DAY OF JULY, 2018 BEFORE THE HONBLE MR.JUSTICE S. SUNIL DUTT YADAV M.F.A.No.1917/2015 C/w M.F.A.No.1221/2015 (MV) In M.F.A.No.1917/2015: Between:

1. K.Yellappa S/o Kakappa, Aged about 49 years.

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5. Rukkamma W/o K.Yellappa, Aged about 44 years. Y.Mary D/o K.Yellappa, Aged about 24 years. Y.Chaithra D/o K.Yellappa, Aged about 22 years. Y.Kavya D/o K.Yellappa, Aged about 18 years. All are residing at No.5, Hellalige Road, Near Arali Katte, Ramasagara, 2 Muthanallur, Bangalore - 560 099. (By Sri.

Sreenivasaiah A, Advocate) And:

1.

2. N.Manju S/o Narayana Reddy, No.64, Soppahalli, Kasaba Hobli, Anekal, Bangalore - 562 106. The Manager, Reliance General Insurance Co.Ltd., RO No.4/3/01 & 3/2, 11th Main Road, 3rd Block, Jayanagar, Bangalore - 560 011. (By Sri. B.Pradeep, Advocate for R-2; Notice to R-1 is dispensed with vide Order dated 1/06/2015) ... Appellants ... Respondents This MFA is filed under Section 173(1) of MV ACT against the judgment and award dated 12.12.2014 passed in MVC No.4828/2013 on the file of the I Additional Small Causes Judge and XXVIII ACMM, MACT, Bangalore, partly allowing the claim petition for compensation of enhancement seeking and ... Appellant 3 In M.F.A.No.1221/2015: Between: Legal Manager, Reliance General Insurance Co.Ltd., Regional Office, 5th Floor, Centenary Building, No.28, M.G. Road, Bangalore - 560 001. (By Sri. B.Pradeep, Advocate) And:

1. K.Yellappa S/o Kakappa, Now aged about 50 years. Rukkamma W/o K.Yallappa, Now aged about 45 years. Y.Mary D/o K.Yalappa, Now aged about 25 years. Y.Chaithra D/o K.Yallappa, Now aged about 23 years. Y.Kavya D/o K.Yallappa, Now aged about 19 years.

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6. 4 All are residing at No.5, Hellalige Road, Near Arali Katte, Ramasagara, Muthanallur, Bangalore - 560 099. N.Manju S/o Narayana Reddy, No.64, Soppahalli, Kasaba Hobli, Anekal, Bangalore - 562 106. ... Respondents (By Sri. A.Srinivasaiah, Advocate for R-1 to R-5; R-6 is served) * * * * This MFA is filed under Section 173(1) of MV ACT against the judgment and award dated 02.12.2014 passed in MVC No.4828/2013 on the file of the I Additional Small Causes Judge and XXVIII ACMM, MACT, Bangalore, awarding compensation of Rs.5,15,000/- with interest at the rate of 6% P.A. from the date of petition till realization. These MFAs coming on for further hearing this day, the Court

delivered the following:

5.

JUDGMENT

The appeal of the insurer is preferred aggrieved by the order of the Tribunal in fastening the liability as regards negligence and the appeal by the claimants is preferred aggrieved by the inadequacy of compensation awarded by the Tribunal, and are disposed by taking up for final disposal, after admitting the same with consent of both parties.

2. The facts as made out in the claim petition is that on 15.8.2013 at about 11.45 a.m., one Vijay (deceased) was proceeding as pillion rider of motor cycle bearing Registration No.KA-51-EF-0901 and when the said motor cycle had reached near GVS College, Soppahlli-Anekal Chandrapura Main Road, a TATA goods vehicle bearing Registration No.KA-51-A-5736 being driven in a rash and negligent manner approaching in the opposite direction, dashed against the motor cycle and the deceased - Vijay son of Yellappa 6 suffered grievous injuries and succumbed to the said injuries and died. In spite of medical treatment, the same being not fruitful, he died immediately thereafter. The claim petition was resisted by the insurer contending that the accident had occurred solely due to the rash and negligent riding on the part of the rider of the motor cycle, as admittedly, he was carrying two more pillion riders on the motor cycle and that the rider lost control of the vehicle and they had a fall.

3. After trial, the Tribunal considering the material on record, allowed the claim petition by awarding compensation of Rs.10,30,000/- on various heads:

1. Loss of dependency 2. Transportation of Rs. 9,60,000/- Rs. 25,000/- dead body and Funeral expenses 3. Loss of love and Rs. 25,000/- affection 4. Loss of estate Total Rs. 20,000/- Rs. 10,30,000/- 7 However, as regards contributory negligence on the part of the rider, taking into account the negligence of the rider of the motor cycle, Tribunal has apportioned negligence and had accordingly scaled down compensation to 50% of the amount awarded. The Tribunal has recorded a finding

that there was triple riding which was not permissible and consequently, there is contributory negligence on the part of the rider of the motor cycle and the deceased, which would have to be taken note of and the claimants would be entitled only to 50% of the compensation awarded. It is this judgment and award that is assailed before this Court by the insurer as well as by the claimants.

4. As regards the question of quantum, the claimants contend that the deceased was aged about 20 years as on the date of the accident i.e., 15.8.2013 and that he was earning Rs.15,000/- per month. Evidence has been let in by the mother of the deceased and 8 documents relating to the police investigation including copy of the FIR, complaint, charge sheet, panchnama, IMV report, post mortem report, inquest panchnama with statements and notarised copies of Aadhar Cards has been produced.

5. While the insurer would contend that admittedly three persons were riding the motor cycle and in view of Section 128(1) of the Motor Vehicles Act, 1988 (the Act for brevity) there was an embargo on the rider of the two wheeler motor cycle to carry more than one person in addition to himself and a person preferring a claim petition who rides the motor cycle in violation of the safety statutory requirements ought not to be entitled to any relief and contends that the claim petition ought to have been rejected on this ground itself. 9 6. It is further contended that the judgment of this Court dated 6.12.2017 passed in M.F.A.No.7074/2016 [The Oriental Insurance Co. Ltd., Vs. Naresh Banu and another]. covers the present case in so far as the Court has observed that a person who does not adhere to safety measures as provided for under the statute, is not entitled to relief and holds that non-compliance of Section 129 of M.V. Act is fatal to the claim for compensation.

7. Further, reliance is also placed on the following judgments:- (a) P.S.Somaiah and another vs. the Director, Bangalore Diary and others reported in AIR 2003 KAR258 to contend that on similar facts the Court had directed apportionment of negligence and restricted the liability to 40% as regards the rider of the motor cycle. He also places reliance on the observation at para 11 in so far as directions were issued for strict observance of 10 Section 128 of the M.V. Act and other

directions with respect to the enforcement of traffic discipline as far as two wheelers are concerned; (b) Decision of Madras High Court in the case of Managing Director Vs. Abdul Salam reported in Laws (MAD) 2003 1 106 and relying on paras-10, 11 and 12, it is sought to be contended that the very conduct of persons who rides the motor cycle when there were three persons would ipso facto be considered to be a factor attributing the contributory negligence as their action was contrary to the statutory requirements.

8. The claimants, on the other hand, seek to counter the judgments relied upon by the insurer and contend that it is not mere statutory violation of safety requirement, but the insurer in order to succeed in scaling down compensation on the ground of contributory negligence, ought to specifically plead and prove that the infraction of a statutory provision 11 stipulating prohibitions, had in fact, contributed to the occurrence of the accident. Hence, it is contended that it is only when the nexus between violation of statutory safety measures and the accident is demonstrated, the question of scaling down liability of the insurer would arise. It is further contended that the claim in the present case being one by the pillion rider, to attribute negligence to a pillion rider would not be legally tenable, as the attribution of negligence would utmost be as regards the rider of the motor cycle and hence, it is contended that the question of attributing contributory negligence to scale down the compensation as regards the claim relating to pillion rider does not arise.

9. As regards the contention that there has to be nexus of the statutory infraction to the accident which only would entitle attribution of contributory negligence, reliance is placed on the following decisions:- 12 (i) Para-12 of the judgment in M.F.A. No.10768/2010 disposed of 20.6.2013 (Anjanppa & another vs. Sri Raghavendra & another) which reads as follows:

12. Therefore, merely breach of law or duty would not create a liability to pay damages. Such a breach of law or duty should result in injury. The contributory negligence does not depend upon any breach of duty. The breach of duty should result in injury and consequent losses. If there is a blame causing the accident on both sides, the losses lie where it falls. Therefore, in the instant case, merely because the deceased was riding the motorcycle with two persons on the vehicle

though it amounts to contravention of Section 123 of the Act it does not amount to a negligent act on the part of the deceased. The driver riding the vehicle if it is demonstrated lost control of the vehicle, he was not able to balance the vehicle or because of such contravention he dashed against the vehicle which resulted in the accident then the question is to what extent 13 this breach of duty resulted in negligence is to be assessed by the Court. (ii) In the same judgment, reliance is also placed on the observations made by the Full Bench in the case of North East Karnataka Road Transport Corporation Vs. Smt.Vijayalaxmi and others reported in 2012 (3) KCCR1772as follows:- ..Therefore, the question of contributory negligence does not depend upon any breach of duty as between the plaintiff and the defendant such a breach of duty should result in injury and consequent losses. In other words, there should be a nexus between the breach of duty and the injury. If there a blame causing the accident on both sides, the losses lie where it falls. The omission constitute a careless conduct. Foresight is the test for duty and awareness. Further, it is observed as follows:- The contravention of the aforesaid provision is nothing to do with the 14 entitlement of compensation. Therefore, the argument of learned counsel for the Corporation that a passenger who has travelled on the roof top of the bus is not entitled to compensation to the full extent and he will be entitled to compensation to the extent of only 50% in the event of any accident resulting in injury or death cannot sustained. (iii) In M.F.A.No.6360/2008 clubbed with M.F.A.No.6361/2008 [Divisional Manager, National Insurance Company Limited Vs. Smt.Sunanda and others]. dated 24.6.2010, where on similar facts i.e., where there were three persons riding the motor cycle and the accident had occurred, the Division Bench had observed at page 17 as follows: In the instant case, no doubt apart from the rider of the motor cycle there were two pillion riders. It is in violation of Section 128. But there is nothing on record to suggest that just because three persons were on the motor cycle, that was the cause 15 for the accident to any extent whatsoever. In the absence of any such evidence mere contravention of a statutory provision cannot be held to have resulted in the accident. Therefore on that score alone negligence cannot be attributed to the violators of the law. It is not possible to hold that merely because there were three persons in vehicle that by itself is a negligent act so as to foist the liability on the violators of law. It is also pointed out that the judgment

relied by the claimant in the case of P.S.Somaiah referred to supra has been distinguished by observing that the observations were made in the context of the facts of a particular case and no law as such is laid down, which is found at page 16 of the said judgment. (iv) In the case of Bharna Kallappa Murashetti and others Vs. Karmajeeth Kaur and others reported in 2017 ACJ1758 wherein on similar facts as the present 16 case the Court after referring to all earlier judgments observes at para-8 that the evidence had to be let in to establish that the violation of statutory provision was also a cause for the accident upon which there could be attribution of contributory negligence. In the said decision, the Court also observes that burden of proof lies on the insurer to adduce evidence to establish contributory negligence and the burden would also extend to proving that the breach of policy ought to be fundamental in nature so as to bring the contract to an end. (v) Sudhir Kumar Rana Vs. Surinder Singh and others reported in (2008) 12 SCC436 at para 9, the Apex Court has held as under: 9. If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the courts below that 17 it was the driver of the mini truck who was driving rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence. (vi) In the case of Union of India Vs. United India Insurance Co. Ltd., reported in (1997) 8 SCC683 wherein the Court had observed that as regards a passenger who lodges a claim, the passenger could not be equated with a driver as regards identifying the extent and imposition of the contributory negligence. Observations in para 10 are relied upon which are as follows:

18. 10 There cannot be a fiction of passenger sharing a right of control of the operation of the vehicle or is their a fiction that the driver is an agent of the passenger. A passenger is not treated as a backseat driver. It is therefore clear tha even if the dirver of the passenger vehicle was negligent, the Railways, if its negligence was otherwise proved - could not plead contributory negligence on the part of the passengers of the vehicle. What is clear is that the qua the passengers

of the bus who were innocent, the driver and owner of the bus and if proved, the Railways can all be joint tortfeasors. 10. The last contention of the claimants is that the burden of proving is primarily on the insurer in the absence of any positive evidence. In the facts of the present case, it cannot be said that the insurer has discharged the burden placed on him entitling for scaling down of compensation on the ground of contributory negligence. 19 11. The claimants have sought for enhancement as regards the income, that has been adopted for calculating the compensation, contending that in the absence of positive evidence regarding the same the tribunal ought to have relied upon the Lok Adalath guidelines regarding notional income.

12. Heard both sides. The points that arise for consideration are: (i) Whether a pillion rider in a motorcycle being ridden by a rider with another person travelling in the bike could be liable to have his claim scaled down on the ground of contributory negligence, on the ground that there were three persons travelling in a motor cycle, as made out in the present case?. (2) Whether the claimants are entitled to enhancement and if so to what extent?. 20 13. Point No.1: The contention of the insurer is to the effect that violation of Section 128 of the Act would disentitle the claimant for any relief in so far as absence of adhering to safety measures statutorily incorporated ought to be viewed strictly so as to penalize non-adherence by disallowing claims. While the argument of claimant on the other hand is that in view of settled law, unless the non-adherence to statutory safety measures was demonstrably a contributing factor to the accident and that the nexus ought to be established between the statutory infraction and the accident, the question of attributing contributory negligence would not arise. A bare perusal of the judgments referred to and relied upon by the claimant clearly lays down the law that there has to be a nexus between the statutory infraction and the accident. The decision in M.F.A.No.6360/2008 other connected matters is strictly on the point and covers the fact situation. It is relevant to note that the 21 decision relied upon by the insurer in P.S.Somaiahs case has also been distinguished by observing that no law is laid down in P.S.Somaiahs case and the observations were to be treated as mere observations and not as laying down the law as regards liability. The principle of law also in the case of Bharna Kallappa Murashetti, on similar facts also point to a similar conclusion. The decision of the

Supreme Court in the case of Sudhir Kumar Rana Vs. Surinder Singh reported in (2008) 12 SCC436 is very clear, where the court has observed that mere absence of a licence could not lead to a positive finding as regards contributory negligence. In the light of the above said judgments, it is clear and unequivocal that there needs to be a nexus between riding of the motor cycle by three persons and the accident that had been caused. The only other judgment that has been relied upon by the insurer in M.F.A.No.7074/2016 [The Oriental Insurance Co. Ltd. Vs. Naresh Babu and another]. could be distinguished by observing that the observations were made in a case relating to infraction of Section 129 of the Act which provides for wearing of protective head gear and the Court on the facts of the said case, has positively observed that head injury was one of the contributory facts and the claimant in the said case had admitted that head injuries could have been avoided if the helmet was worn. The said admission and also nature of injuries that had occurred which had a nexus with the non-wearing of a Helmet is a distinguishing factor, which is not so in the present case. In the light of the above law, its application in the present case is to be dealt with.

14. The subsidiary contention that requires to be dealt is as under: Whether in the facts of the present case, the insurer had discharged the burden of establishing the factum of three persons riding on the motor cycle had attributed to the occurrence of the accident?..

15. The insurer, no doubt, has raised the contention of triple riding as being a contributory factor in the statement of objections, but there is no positive evidence that has been adduced by the insurer nor any steps have been taken to prove such defence. The nature of burden of proof of the insurer has been dealt with by the Apex Court in Lakshmi Chand Vs. Reliance Insurance General Co. Ltd. reported in 2016 ACJ551 wherein it has been held that in order to avoid liability, the Insurance Company must not only establish the defence claimed in the proceeding concerned, but also establish breach on the part of the owner of the vehicle and such burden of proof would rest on the Insurance Company. The Apex Court had also approved the observations in the case of B.V.Nagaraju Vs. M/s. Oriental Insurance Co. Ltd. reported in 1996 ACJ117824 to the effect that the breach complained of must be so fundamental that it would bring the contract to

an end.

16. In the present case, it is clear that charge sheet has been filed against the driver of the TATA Goods Vehicle, no effort has been made to file a complaint against the rider of the motorcycle and in the absence of any steps being taken by the insurer to summon the rider of the motorcycle, the insurer has failed in its duty in proving the defence in terms of the obligation imposed in Laxmichands case (supra). In fact, the panchnama at Ex.P.4 reveals that the accident has taken place at a spot where the road curves as L shaped and the road was under repair and was being laid out afresh. In the light of such facts, there was a duty on the driver of the goods vehicle to observe a higher degree of care and caution and to impute negligence on the victim is not legally tenable. 25 17. The deceased being a pillion rider assumes significance as regards the attempt of imputation of negligence to scale down the liability in the light of observations of the Apex Court in the case of Union of India Vs. United India Insurance Co. Ltd. and others reported in (1997) 8 SCC683 which clearly lays out that the driver could not be said to be an agent of the passenger and there could not be a fiction of the passenger sharing a right of control of the operation of the vehicle. It is also clarified that the passenger essentially being innocent, negligence at the most could have been attributed to the owner and driver of the bus.

18. Extending the above mentioned principle to the facts of the present case, the fact that the deceased was a pillion rider would free him from bearing contributory negligence. If it were that the deceased was a driver, the case would have been entirely different, which is not so. Accordingly, there could be 26 no question of imputing negligence to a pillion rider. Hence, the defence of the insurer as regards imposition of liability on the pillion rider on the ground of non- adherence to statutory safety measures is rejected. Accordingly, the question framed is answered in the negative. Re:Point No.2.

19. The appellants have assailed the order the Tribunal contending that adoption of income of the deceased as Rs.5,000/- per month contending that it was on the lower side and at the least the income as stipulated under the Lok Adalath guidelines ought to have been taken judicial notice of. The claimants have not let

in any evidence apart from the mother of the deceased as regards the avocation or income of the deceased. In the absence of positive evidence as regards nature of avocation, it would be appropriate to adopt the income as stipulated under the Lok Adalath guidelines, 27 considering the date of accident i.e., 15.8.2013, the income of the deceased could be taken as Rs.8,000/- per month with future prospects of 40% on the said income. The income to be taken for the purpose of calculating loss of dependency would be Rs.11,200/-.

20. As regards deduction, the Tribunal has taken the deduction at 1/3rd of the income while the counsel for the insurer contends that it is settled law that deduction of 50% has to be taken note of as the deceased was a bachelor. Though the claimants contend that where the family is large, as in the present case and the dependents are also large in number, by restricting deduction towards personal and living expenses, deduction could be reconstructed at 1/3rd. However, considering that the father of the deceased was alive and aged 48 years and also considering that two of his sisters were elder to him, deduction of anything less than 50% is not supported by evidence or 28 material on record and hence, the deduction by the Tribunal at 1/3rd is set aside and deduction of 50% is to be taken into account. Accordingly, considering the future prospects and deduction at 50%, loss of dependency would be recalculated as follows:

$8000. \times 40\% = 11,200 \times 50\% \times 12 \times 18 = \text{Rs.}12,09,600/-$ 21. As regards the compensation on conventional heads, the Tribunal has granted Rs.50,000/- and in view of the judgment in the case National Insurance Company Limited v. Pranay Sethi and others reported in AIR 2017 SC5157 the compensation under conventional heads is scaled down to the extent of 30,000/-. Accordingly, the compensation works out to Rs.12,39,600/-. Hence, the compensation would be enhanced by Rs.7,24,600/-.

22. Accordingly, the appeal as regards the claimants is allowed-in-part and the compensation stands enhanced. The appeal of the insurer, viz., 29 M.F.A.No.1221/2015 seeking fastening of liability on the owner and scaling down of quantum is dismissed.

23. In view of the above the amount in deposit is ordered to be transferred to the Tribunal along with Fixed Deposit bonds. RS/* ct:am Sd/- JUDGE

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