

Vilas Vs. Hasimapeer and ors.

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Court : Karnataka

Decided On : Jan-28-1997

Reported in : II(1998)ACC71; 1999ACJ422; 1997(4)KarLJ311

Judge : Hari Nath Tilhari, J.

Appeal No. : M.F.A. No. 1146 of 1993

Appellant : Vilas

Respondent : Hasimapeer and ors.

Advocate for Def. : K.M. Srinivasa Rao, Adv. for ;S.K.V. Chalapathy and ; N.S. Shivayogimath, Adv.

Advocate for Pet/Ap. : Ravi S. Balikai, Adv.

Disposition : Appeal allowed

Judgement :

Hari Nath Tilhari, J.

1. This appeal arises from the award given under Motor Vehicles Act for compensation to the tune of Rs. 40,000 with interest at the rate of 6 per cent vide award dated 28.8.1992 delivered by Mr. S.S. Bhagoji, the Motor Accidents Claims Tribunal No. II, Bijapur, in M.V.C. Case No. 250 of 1990.

2. The facts of the case in nutshell are that the claimant/appellant, who was aged about 12 years and who was a student of VIII class, on 4.3.1990 sustained injuries on account of the accident that had taken place on that day at 13.15 hours near P.W.D. Office, Lokapur. The accident was alleged to have been caused as well as has been held to have taken place on account of rash and negligent driving of the lorry by the respondent No. 1, the driver of the lorry bearing No. MYL 5335. According to the claimant's case, the lorry going in a rash and negligent manner dashed against the petitioner and passed over the right foot of the petitioner and the right foot of the claimant was completely crushed and bones were cut into pieces. According to the claimant, the claimant was taken to the hospital in PHC Lokapur and then to General Hospital, Bagalkot and thereafter to KLE Hospital, Belgaum for treatment intensive treatment. According to the claimant's case, the claimant injured was a sportive and active boy before the accident occurred. According to the claimant's case, on account of the accident the boy, Vilas, injured has been completely disabled to walk and run and cannot walk without any support and has been rendered handicapped and unfit to take part in any sports. He has lost his bright future in education and games and also in respect of key posts. His family also suffered due to the inability and disability of the petitioner, the claimant. Respondent No. 2 has been the owner of the vehicle, while respondent No. 3 is the insurer of the vehicle and the claimant made a claim for compensation to the tune of Rs. 2,60,000 jointly and severally against all the respondents.

3. After service of the notice, though respondent Nos. 1 and 2, the owner and driver of the vehicle, did put in appearance through the counsel, but they did not file any written statement. Only respondent No. 3, i.e., the insurance company filed the written statement denying the claim of the claimant.

4. On the basis of the pleadings of the parties, the Tribunal framed the following issues:

(1) Whether the petitioner proves that on 4.3.1990 at 13.15 hours near P.W.D. Office at Lokapur the lorry bearing registration No. MYL 5335 was driven in rash and negligent manner?

(2) Does he further prove that due to such rash and negligent driving he sustained grievous injuries?

(3) To what compensation the claimant is entitled and from which of the respondents?

5. The Tribunal after examination of the material on record, answered issue Nos. 1 and 2 in the affirmative and held that the claimant has established that on 4.3.1990 at 13.15 hours lorry bearing No. MYL 5335 was being driven in a rash and negligent manner by the respondent No. 1 near PWD Office, Lokapur and on account of that rash and negligent driving of the above vehicle, the claimant Vilas Hatagar sustained and suffered grievous injuries. After having recorded the above findings, the Tribunal held that the ends of justice will be met by awarding a lump sum compensation of Rs. 40,000 covering the various heads like pain and suffering, the amount spent for medical treatment and other expenses and for loss of amenities and thus awarded in lump sum a sum of Rs. 40,000 as compensation. Having felt aggrieved from this award and dissatisfied with the sums awarded, the claimant has filed this appeal. No cross appeal or cross-objection has been filed or preferred on behalf of either of the respondents.

6. I have heard Mr. Ravi S. Balikai, learned Counsel for the appellant and Mr. K.M. Srinivasa Rao holding brief for Mr. S.K.V. Chalapathy, learned Counsel for respondent No. 3 at good length.

7. The appellant's counsel submitted before me that the amount of compensation awarded is quite unsatisfactory on the one hand and on the other hand, the Tribunal ought to have awarded pecuniary loss and non-pecuniary loss separately. The global loss awarded which cannot ordinarily be assessed on the basis of evidence, but efforts have to be made to award it keeping the circumstances of the case. But where the damage or loss in the form of medical expenses or expenses for hiring a vehicle is proved and evidence has been led, the pecuniary loss and assessable loss should have been awarded separately. The learned Counsel submitted that the injuries caused on the body of the boy particularly by crushing of the right leg and the injuries mentioned by the doctor clearly reveal that the boy has lost his future prospects to a greater extent. He was a sportsman, interested in

sports. The boy had very high hopes to become one of the important players in future and sportsman in future of higher stature and ambitions to attain stature of a great player as country has produced at many times. But because of these injuries, those prospects have become bleak. The marriage prospects of the boy have also been adversely affected. Learned counsel submitted that the boy, as evidence which has been produced indicates, is unable to move properly or to play. He further submitted that the boy had to live in the hospital for about six weeks or so. He has been subjected to pain and suffering and even at the time when he was produced to give the evidence, his defects had not been cured. Learned counsel for the appellant submitted that the Tribunal ought to have taken into consideration that the malady caused by the defects and fracture in the right leg and by other injuries, the young boy will have to carry on for his whole life and, therefore, the compensation awarded by the Tribunal was insignificant and it requires to be enhanced.

8. On behalf of the insurance company, respondent No. 3, the contentions made on behalf of the appellant have been hotly contested. The learned Counsel submitted that the compensation which has been awarded to the tune of Rs. 40,000 is sufficient and does not require to be enhanced. The learned Counsel further submitted that the boy has already become a major almost a year back. The claimant was a minor at the time when the claim petition was filed and when the appeal was filed. But now he has become a major. He has not opted to pursue the appeal and he has not sought to be impleaded in his independent capacity and so the appeal should be dismissed or hearing on disposal may be deferred till he expresses his desire to continue with the proceedings himself independently after getting the next friend discharged.

9. I have applied my mind to the respective contentions of parties counsel. That as regards the merits of the appeal, the only question that has been raised by the appellant is about the quantum of compensation awarded that compensation of Rs. 40,000 is insufficient and inadequate. In my opinion, there is substance in the contention of the appellant's counsel. The injured admittedly had been aged about 12 years at the time of the accident. According to the doctor's report and statement of doctor, PW 3, Dr. Sharad Antin, the injured was examined on 22.1.1992.

- (1) It was found that the boy walks with high step of gait of right foot and limbs.
- (2) There is a depressed scar over the left thigh measuring 19 x 15 cm.
- (3) Right foot is supinated, second toe is amputated.
- (4) Right foot is slightly tendered.
- (5) Right foot has huge swelling over the dorsum.
- (6) Movements of the toes restricted at interphalangeal joints and metatarsophalangeal joints.
- (7) Lost 10 degrees of ankle movements both dorsa flexion and plantar flexion restricted.
- (8) X-ray shows thickening of the first metatarsal bone and mal-united fracture of second and third metatarsals.
- (9) The permanent physical disability is 20 per cent. The doctor, in his statement, has stated that the boy has suffered physical deformity. The doctor also mentioned that permanent disability is 20 per cent during cross-examination and stated that the thickening of first metatarsal bone may be due to callous formation or due to bone injection.

10. Looking at the age of the boy he being interested in games and studies and his high hopes of life to attain the high positions in sports or other phases of life which every young boy has got that he may attain high stature even in sports or otherwise to become great player like Gavaskar or Kapil Dev or the like or in other fields as in democratic India a person may think of development in any phase of life, may be in the national phase or otherwise have suffered. We have to examine that what effect these injuries have caused to him. Apart from that, it has also to be considered that amenities of life which he could have enjoyed, have also been adversely affected. Even in the marriage market, there may be diminishing trends and chances, may not be completely bleak, but there may be diminution. He may suffer adversely in the enjoyment of the matrimonial life. In the future, these facts have to be given due consideration. Apart from that, when the right foot is

supinated, this deficiency the boy has to carry on for his whole life and in such cases such injured persons require more sympathy than in any other case or in case of even death. Because in the case of death, the dependants get the benefit and in the case of injured, they have to carry the malady for their whole life. So they must get more sympathy. Further, the boy had suffered pain and suffering and had been hospitalised for more than one month as per the evidence on record and he had to bear the pain and suffering. Considering these aspects, in my opinion, the claimant should have been awarded Rs. 60,000 as global compensation for injuries, pain and suffering and loss of future amenities and prospects of life. The evidence on record further reveals that the claimant has been able to prove by producing the documents as well as with the help of the oral evidence of the doctor that he has incurred expenses to the tune of, no doubt, Rs. 12,000 and there might be certain other bills or receipts which may not have been traceable. Apart from that, he has also proved that he has spent Rs. 1,000 or so on conveyance charges. In this view of the matter, in my opinion, as regards the damages for expenses relating to medicine and medical treatment incurred and expenses towards the nourishment, the claimant is entitled to be awarded a sum of Rs. 15,000 while in respect of conveyance charges, he is entitled to Rs. 1,500. Thus, in my opinion, the compensation which was awarded in lump sum for pain and suffering and loss of future amenities and prospects of life, medical expenses, nourishment, conveyance to the tune of Rs. 40,000 has been quite insufficient and inadequate. In my opinion, the petitioner is entitled to the sums as under:

(1) Global compensation for injuries, pain and suffering, loss of amenities and prospects in future life, etc. (which cannot be assessed in terms of money ordinarily) ...	Rs. 60,000
(2) For medical expenses and nourishment ...	Rs. 15,000
(3) For conveyance charges ...	Rs. 1,500
	-----Rs. 76,500-----

Thus, the claimant is entitled to a total sum of Rs. 76,500 as compensation.

11. The other, though technical, contention raised by the learned Counsel for the respondent No. 3, insurance company, is that as the boy has now become a major and has not opted to pursue the appeal, the appeal should be dismissed. No doubt, in March 1990 at the time when the accident had taken place the age of the

boy claimant was about 12 years. In the claim petition which had been filed on 20.3.1990 the claimant's age has been indicated as 12 years. In Exh. P-4, the wound certificate on record, the age of the boy was mentioned as 10. years while in the deposition which was recorded on 24.8.1991 it is recorded as 13 years. In the memo of appeal filed in 1993, his age has been shown to be about 14 years. No doubt, the boy has completed the age of 18 years on or before 8.1.1997 and at the most it might have been six months earlier. The minor, no doubt, has become a major. It is his option not to continue with the proceedings and to instruct his lawyer to get the appeal dismissed, that he might not have made an application for being allowed to continue the proceedings independently but must have opted that the appeal may be pursued and continued. Order 32, Rule 12 of the Code of Civil Procedure deals with such matters, it will be proper to be reproduced. Order 32, Rule 12 reads as under:

Order 32, Rule 12. Course to be followed by a minor plaintiff or applicant on attaining majority: () A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus:

A.B., late a minor, by C.D., his next friend, but now having attained majority.(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made ex parte, but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

Rule 12 (1) no doubt requires a minor plaintiff as and when he attains the majority, it is open to him to elect or select one of the two courses, whether he wants to proceed with the suit or application or he wants to abandon the suit or application. If he himself wants to proceed with the suit or application, he will have to apply for discharge of the next friend and for permission of the court to proceed with the suit or application in his own name. The order discharging his next friend and permitting the original minor plaintiff to proceed in his own name, the rule requires such an order shall not be made without notice to the next friend. The other part of the rule, i.e., Sub-rule (4), as mentioned earlier, provides that if he elects to abandon the claim, suit or application, then he shall apply to the court to dismiss the suit or application. But he had to bear the costs of the defendant as well as the costs that the next friend paid or incurred in instituting the litigation. The rule is silent and does not specifically provide that if a minor on attaining the majority had not moved the court, what will be the consequences, whether those proceedings will come to an end or it should be taken that the proceedings as instituted even by the guardian should be continued. A reading of Rule 12 (2) and (4), no doubt, impliedly indicates and it may be taken to be impliedly indicating that if a minor after attaining the majority has not elected to abandon the suit or application and does not apply for dismissal of the suit or application, the proceeding may continue as it was going on. May be because of his failure to give any clear indication of the course, a minor on becoming a major if and when a decree was passed against him, it may be said to be binding on him when he allowed the proceedings to be continued by the next friend who had initiated the proceedings. In the present case, the appellant's counsel Mr. Ravi S. Balikai by whom appeal had been filed, in the appellant's name through the next friend, has urged that the minor, even if he has attained majority six months earlier, has not sought for abandonment of the proceedings. The proceedings had been validly initiated and decree validly passed cannot be said to be illegal even if the minor would have become major in course of proceedings before the Tribunal, nor could the proceedings be deemed to have come to an end, instead may be continued for the benefit of the appellant (injured) without delay being allowed to be caused in disposal of matter on simple technical basis. Learned counsel submitted that even if at this stage minor on becoming major would have applied for abandonment of the appeal, the decree already

passed could not have been rendered illegal or in-operative. It would have remained binding on the respondents though appeal might have been dismissed on appellant abandoning the appeal. Mr. Balikai submitted when appellant has not applied for abandoning the appeal at all nor has given any such instruction as such appeal may neither be dismissed nor be taken to have become infructuous nor respondent be permitted to cause delay in final disposal and decision of appeal.

In these circumstances, particularly when I find the appeal likely to be allowed, this contention of respondent needs be rejected in the interest of justice for reasons hereinafter. The appellant became major sometime in 1996, may be in March 1996, but his counsel has never been instructed to abandon the proceedings in appeal nor has the appellant on becoming major applied for abandonment of case or appeal. Now if the decision of the appeal is adjourned for simple ground that the appellant Vilas has not moved the application expressing the desire either way, it will result in nothing but in delaying the final disposal of this matter and particularly in a case where the court may find the case of the respondent to be weak or case of the defendant to be weak. This technical point has been raised by the counsel for the respondents when he realised that perhaps his arguments are not appealing to the court. Anyway, in my opinion, the rules are procedural meant to substantiate cause of justice and have to be interpreted keeping in view other rules as well and in manner that no one be allowed to cause delay to the proceeding taking shelter under technicalities. The minor appellant has become major but has not filed any application for abandonment of the proceedings in appeal under Order 32, Rule 12 (4) or for dismissal of appeal, appeal may continue, in its form as filed in his interest in the necessary implied interest of appellant.

I do not think it proper to reject the appeal of the injured on this ground. There appears no good reason to conceive or think that the appellant could have come and said before the court that my appeal may be dismissed and no enhancement of the compensation in my favour be made. A similar view on such subject has been expressed by a Division Bench of the Gujarat High Court in the case of Dharamshi Polabhai v. Champuklal Vashram : AIR1983 Guj217 . S.B. Majmudar,

J. as he then was, delivering judgment in the Gujarat High Court in the aforesaid case observed at page 223:

On a mere reading of Order 32, Rule 12, it is not possible to agree with the broad submission canvassed on behalf of the petitioner by the learned Advocate General that the moment a minor plaintiff who attained majority pending the proceedings in a suit fails to elect one way or the other, whether to proceed with the suit or to abandon the suit, subsequent proceedings before the trial court become unauthorised and the decree that follows either dismissing the suit or decreeing the suit would ipso facto become void decree. No such fatal effect can be culled out from the non-compliance of the procedural provision of Order 32, Rule 12, as tried to be suggested by the learned Advocate General for the petitioner. In fact, an option is given to the minor plaintiff to elect either to proceed with the suit in his individual capacity or to abandon the suit. But if he does not exercise his option by mere inaction on his part, no inference can be drawn that he had decided to abandon the suit and had opted for dismissal of the suit as laid down by Order 32, Rule 12 (4). The said rule enacts procedural provision giving an option to the minor plaintiff and it nowhere lays down any penalty for the minor plaintiff imposing any fatal consequence if election is not exercised one way or the other by the minor on attaining majority pending the suit.

His Lordship further observed:

It is obvious that merely because the minor plaintiff having become major does not exercise his option under Order 32, Rule 12, one way or the other, during pendency of the suit, it cannot be said that thereby any irregularity, defect or error of the type which affects the merits of the case or jurisdiction of the court gets projected in the proceedings of the court.

In the case of *Savithri v. Vasudevan Nambudiri* : AIR1959 Ker387 , a Division Bench of the Kerala High Court also has taken the view that if a minor plaintiff or defendant when he comes of age, does not come to conduct the defence himself and he allows the case to proceed as though he was still a minor, then the person may be deemed to have elected to abide by the decree or adjudication by the court in the case. Similar is the view expressed by the Allahabad High Court in the

case of Hazari v. Suresh : AIR1979 All242 , as per observations made in para 11 of the decision. As such, in my opinion, there is no force in this contention of the learned Counsel appearing for respondent No. 3. If the respondent wanted to raise this argument, he should have filed an application that the appellant had not exercised the option and so the appeal may be dismissed. Then at that stage, the appellant could have been asked to take the steps. Now at the stage when the appeal is being heard finally and the respondent thinks that the appeal may get fructified and there is no case of any injury being caused to the minor appellant who has become major if appeal is allowed on merits in view of my findings recorded above, I do not think it proper to allow the respondent to raise this question and delay the whole proceedings for nothing, and it is deemed that and I deem and take that really the appellant had opted to continue with the proceedings as they are being run through his next friend, the father. At the most it can be said that the decree passed against him in such cases of appellants is binding on him and he could not claim that decree is not binding because of his inaction. In these circumstances, the contention raised by the respondent is rejected.

The appeal is thus allowed and the award is modified as indicated above and the claim is awarded as under:

(1) Global compensation for injuries, pain and suffering, loss of amenities and prospects in future life and disablement ... Rs. 60,000
(2) For medical expenses and nourishment ... Rs. 15,000
(3) For conveyance charges ... Rs. 1,500-----
Rs. 76,500-----

Thus, in total, the appellant claim is decreed by award to the tune of Rs. 76,500 with interest at enhanced rate of 9 per cent in respect of unpaid amount so far from the date of filing of the claim petition till the date of payment. This enhancement will apply in respect of the amount which had remained unpaid. It is clarified that it will be open to the appellant to apply for execution of award, if necessary, in his own right to implement the decree if the respondent does not pay or deposit the amount awarded or the balance of the amount awarded as provided by this Court within six weeks from today.

