

Jessy Vs. A.V.Korath

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Court : Kerala

Decided On : Apr-07-2015

Judge : Honourable Mr.Justice T.R.Ramachandran Nair

Appellant : Jessy

Respondent : A.V.Korath

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR & THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN TUESDAY, THE 7TH DAY OF APRIL 2015 17TH CHAITHRA, 1937 MACA.No.1348 of 2009 (B) ----- AGAINST THE AWARD IN OPMV20772001 of M.A.C.T.,PERUMBAAVOOR DATED 30-09-2006 APPELLANTS/PETITIONERS: ----- 1.AGED W/O. LATE WILSON, JESSY, 35 YEARS, KOLENCHERRY HOUSE, MANJAPRA VILLAGE, MANJAPRA.P.O. 2.KOLENCHERRY ALAN.K.WILSON, S/O. WILSON, HOUSE, MANJAPRA VILLAGE, MANJAPRA.P.O. 3.KOLENCHERRY ALWIN.K.WILSON, S/O. WILSON, HOUSE, MANJAPRA VILLAGE, MANJAPRA.P.O. (APPELLANTS 2 AND 3 ARE MINORS AND THEY ARE REP. BY THEIR MOTHER JESSY, 1ST APPELLANT) 4.MANJAPRA KUNJAVIRA, KOLENCHERRY HOUSE, JOSE, S/O.VILLAGE, MANJAPRA.P.O. BY ADVS.SRI.E.C.POULOSE SMT.BOBBOY RAPHAEL.C RESPONDENTS : RESPONDENTS :- ----- * deleted 1. A.V.KORATH, PYNADATH HOUSE,

AYYAMPUZHA.P.O., MANJAPRA. *(R1 is deleted from the party array at the risk of the appellant vide order dated 14.1.2015 in I.A.1/15.) 2.BRANCH I NDIA ASSURANCE CO. LTD., THE NEWOFFICE, ANGAMLY. R2 BY ADV. SMT.M.HEMALATHA THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING COME UP FOR ADMISSION ON0704-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: T.R.RAMACHANDRAN NAIR & ANIL K.NARENDRAN, JJ.

----- M.A.C.A.No.1348 of 2009
----- Dated this the 07th day of
April, 2015

JUDGMENT

Anil K.Narendran, J.

The appellants are the petitioners in O.P.(MV)No.2077 of 2001 on the file of the Motor Accidents Claims Tribunal, Perumbavoor, an application filed under Section 166 of the Motor Vehicles Act, 1988, claiming compensation for the death of one Wilson, who died in a motor accident. The first appellant is the widow of the deceased, the second and third appellants are his children and the fourth appellant is the father of the deceased. On 26.10.2001, Mr. Wilson was riding his bike bearing No.KL-07/V-4924 from Manjapra to Angamaly through Manjapra-Angamaly public road, from east to west. When the bike reached Kidangoor, a mini lorry bearing registration No.KL-07/P-7714, driven by the first respondent, came from the opposite direction and hit the bike. Mr. Wilson fell down on the road and sustained injuries. After four days he succumbed to the injuries. The appellants contended that, the accident occurred due to the rash and negligent driving of the mini lorry by the first respondent. At the time of accident, Mr. Wilson, who was aged 36 years, was working as a driver and earning a monthly income of 3,500/-. Claiming a total compensation of 5,89,000/- under various heads, the M.A.C.A.No.1348 of 2009 2 appellants filed O.P.(MV)No.2077 of 2001 before the Motor Accidents Claims Tribunal, Perumbavoor, against the first respondent, who is the owner-cum-driver of the mini lorry and the second respondent, who is the insurer of the said lorry.

2. The first respondent-driver remained ex parte. The second respondent-insurer filed written statement admitting the policy of insurance of the mini lorry in question during the relevant time. They have also admitted that, at the time of accident the first respondent was driving the vehicle. But, they contended that, the accident occurred due to the rash and negligent riding of the motor bike by the deceased Wilson and that the compensation claimed under various heads is highly exorbitant and exaggerated.

3. On the side of the appellant Exts.A1 to A10 were marked and PWs.1 to 3 were examined. On the side of the respondents Ext.B1 was marked. The respondents have not chosen to adduce any oral evidence.

4. The Tribunal by award dated 30.9.2006 came to the conclusion that the accident occurred due to the negligence on the part of the first respondent-driver of the mini lorry. The Tribunal has also found that there is contributory negligence on the part of deceased Wilson and fixed the liability between the first respondent driver and deceased Wilson as 75:25. The Tribunal fixed the total compensation under various heads at 4,02,640/- and fixed the total compensation payable to the appellants at M.A.C.A.No.1348 of 2009 3 3,02,000/-, as the liability of respondents 1 and 2 is limited to 75%.

5. The Tribunal found that respondents 1 and 2 are jointly and severally liable to pay the compensation amount to the appellants, together with 7% interest from the date of application till the date of realisation. The Tribunal held that, appellants 1 to 3, who are the widow and children of deceased Wilson, are entitled to 95% of the award amount in equal share and the fourth appellant, who is the father of the deceased, is entitled for 5% of the award amount. The second respondent-insurer was directed to produce separate cheques in the name of the appellants for their respective shares within a month from the date of award. On such production of cheques, the share of appellants 2 and 3, who are minors, was directed to be deposited in a bank till they attain majority. The first appellant was allowed to withdraw 25,000/- and the balance amount of her share was directed to be deposited in a bank for five years with permission to withdraw the interest per month. The Tribunal has also ordered that, the fourth appellant will be entitled to

withdraw his share in the compensation.

6. Aggrieved by the finding of the Tribunal regarding contributory negligence on the part of deceased Wilson and also on the quantum of compensation payable under various heads, the appellants are before us in this appeal.

7. We heard the arguments of the learned counsel for the M.A.C.A.No.1348 of 2009 4 appellants and also the learned counsel appearing for the second respondent-insurer.

8. The main questions that arise for consideration in this appeal are as to whether the finding of the Tribunal that the accident occurred due to contributory negligence on the part of deceased Wilson is sustainable in law and also whether the compensation awarded by the Tribunal under various heads represent just, proper and reasonable compensation.

9. Going by the averments in the petition, the accident occurred on 26.10.2001, while deceased Wilson was riding his bike from Manjapra to Angamaly, through Manjapra-Angamaly public road, from east to west. When the bike reached Kidangoor, a mini lorry driven by the first respondent in a rash and negligent manner came from the opposite direction and hit on the bike. Deceased Wilson fell down on the road and sustained serious injuries. Later, he succumbed to the injuries while undergoing in-patient treatment.

10. The appellants contended before the Tribunal that the accident occurred solely due to the rash and negligent driving of the mini lorry by the first respondent-driver. Per contra the second respondent-insurer contended that, there is contributory negligence on the part of deceased Wilson. Ext.A1 is the copy of the FIR, Ext.A2 is the copy of the charge sheet and Ext.A3 is the scene mahazar. Going by Ext.A3 scene mahazar, M.A.C.A.No.1348 of 2009 5 the accident occurred 1.83 metres north from the southern tarred end of the road. The total width of the tarred road is 5.28 metres. The tarred road has got a curve and there is a distant view for 200 meters from west to east. Ext.A4 AMVI report of the bike shows damages on its front portion. Ext.A7 AMVI report of the mini bus shows damages on its front portion and also on its left side. The Tribunal, mainly relying on the position of the

vehicles, as shown in Ext.A3 scene mahazar came to the conclusion that the mini lorry was on the correct side and that there is contributory negligence on the part of deceased Wilson.

11. In *Jiju Kuruvila and others v. Kunjujamma Mohan and others* (2013 (9) SCC166 the Apex Court held that, the mere position of vehicles after accident, as shown in scene mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. Paragraph 24 of the judgment reads thus:-

"4. The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction etc. depends on number of factors like speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident caused, but in absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the M.A.C.A.No.1348 of 2009 6 Court cannot give any specific finding about negligence on the part of any individual." 12. In *Meera Devi and another v. H. R. T. C. and others* (2014 (4) SCC511 the Apex Court has reiterated that, "to prove contributory negligence, there must be cogent evidence". In the case on hand, the respondents have not chosen to adduce any specific evidence to prove that the accident has taken place due to the rash and negligent riding of the bike by deceased Wilson. On the other hand, the evidence of PW3 prove beyond reasonable doubt that the accident occurred solely due to the rash and negligent driving of the mini lorry by the first respondent. At any rate, in the absence of any cogent evidence to prove the plea of contributory negligence, the Tribunal ought not to have applied the said doctrine of common law in the case on hand. Therefore, the finding of the Tribunal that the accident occurred due to contributory negligence on the part of deceased Wilson cannot be sustained in law and we hold that, the accident occurred solely due to the negligence of the first respondent in driving the mini lorry.

13. Now we shall consider whether the compensation awarded by the Tribunal under various heads represent just, proper and reasonable compensation.

14. Going by the averments in the petition, deceased Wilson was a driver by profession and he was aged 36 years at the time of accident. M.A.C.A.No.1348 of 2009 7 The fact that, deceased Wilson was a driver by profession at the time of accident, holding Ext.A9 licence, was not seriously disputed before the Tribunal by the second respondent-insurer. Ext.A8 salary certificate issued by the Mary Matha Modern Rice Mill, Kalady, would show that deceased Wilson was a permanent employee of that firm and that he was earning 3,500/- per month. The person who has issued Ext.A8 salary certificate was not examined before the Tribunal. In *Minu Rout and another Vs. Satya Pradyumna Mohapatra and others* (2013 (10) SCC695 the Apex Court held that, awarding just and reasonable compensation is the statutory duty of the Tribunal and the Appellate Court. Taking judicial notice of the fact that the post of driver is a skilled job and also the rate of minimum wages prevailing in the State during the relevant time, we take 4,000/- as the monthly earning of the deceased for awarding just and reasonable compensation to the appellants. Therefore, in the facts and circumstances of the case, we refix the monthly earning of deceased Wilson as 4,000/-. The Tribunal awarded 3,20,640/- towards loss of dependency. Taking into consideration the monthly income of the deceased at 4,000/- and reducing one third for his personal expenses we refix the compensation payable to the appellants towards loss of dependency at 5,40,000/- (4,000 x 12 x 15 x >).

15. Towards funeral expenses, the Tribunal awarded a sum of 3,000/-. In *Rajesh and others v. Rajbir Singh and others* (2013 M.A.C.A.No.1348 of 2009 8 (9) SCC54 the Apex Court held as follows; "The head 'funeral expenses' does not mean the fee paid in the crematorium or fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of 'funeral expenses', in the absence of evidence to the contrary for higher expenses, to award at least an amount of 25,000/-." Following the aforesaid

judgment of the Apex Court, the compensation towards funeral expenses is re-fixed as 25,000/-.

16. Towards attendance charges the Tribunal awarded a sum of 1,000/-. Considering the nature of injuries sustained and the in-patient treatment the deceased had undergone, we re-fix the compensation under this head as 1,500/-.

17. Towards pain and suffering, the Tribunal awarded a sum of 15,000/-. It is not in dispute that, the deceased sustained serious injuries in the accident and later he succumbed to the injuries. Considering the nature of injuries sustained, as borne out from Ext.A6 wound certificate, the compensation towards pain and suffering is re-fixed as 20,000/-.

18. Towards compensation for loss of love and affection, the Tribunal awarded a sum of 25,000/- and a further sum of 20,000/- was M.A.C.A.No.1348 of 2009 awarded towards compensation for loss of consortium. In *Rajesh and others v. Rajbir Singh and others* (2013 (9) SCC54 and in *Jiju Kuruvila and others v. Kunjamma Mohan and others*, (2013 (9) SCC166 the Apex Court has awarded substantial amount of 1,00,000/- towards loss of consortium and 1,00,000/- towards loss of love and affection. Following the aforesaid judgments of the Apex Court, the compensation towards loss of consortium is re-fixed as 1,00,000/- and the first appellant, who is the widow of the deceased, will be entitled for the said amount. Similarly, the compensation towards loss of love and affection is re-fixed as 1,00,000/- and the second and third appellants, who are the children of the deceased, are entitled for the said sum.

19. Towards loss of estate, the Tribunal awarded only a sum of 2,500/-. Considering the facts and circumstances we find it just and proper to re-fix the compensation under this head at 35,000/-.

20. Towards transportation expenses and medical expenses the Tribunal has granted 2,500/- and 13,000/- as compensation. In the absence of any cogent and convincing materials on record, the appellants are not entitled for any enhancement of compensation under these heads.

21. In the result, this appeal is allowed enhancing the compensation awarded to the appellants under various heads, in the following manner; M.A.C.A.No.1348 of 2009 10 Head of claim Amount Modified award awarded by passed by this the tribunal Court Loss of dependency 3,20,640/- 5,40,000/- Funeral expenses 3,000/- 25,000/- Transportation charges 2,500/- 2,500/- Medical expenses 13,000/- 13,000/- Attendant Charges 1,000/- 1,500/- Pain and suffering 15,000/- 20,000/- Loss of love and affection 25,000/- 1,00,000/- Loss of consortium 20,000/- 1,00,000/- Loss of estate 2,500/- 35,000/- Total 4,02,640/- 8,37,000/- 22. Since we have held that the accident occurred solely due to the negligence on the part of the first respondent-driver, the appellants will be entitled for 100% of the total compensation amount of 8,37,000/-.

23. The Tribunal awarded interest at the rate of 7% from the date of petition till realisation. In *Kaushnuma Begum v. New India Assurance Co. Ltd.* (2001 (2) SCC9, taking note of the fact that the nationalised banks are granting interest at the rate of 9% per annum on fixed deposits for one year, the Apex Court directed that, the compensation amount refixed shall bear interest at the rate of 9% per annum from the date of the claim. In *Supe Dei (Smt.) and others v. National Insurance Company Ltd. and another* (2009 (4) SCC513, after referring to the earlier decision in *Kaushnuma Begum's case* (supra), M.A.C.A.No.1348 of 2009 11 the Apex Court awarded 9% interest to the claimant in that case. In view of the above decisions of the Apex Court, we find it just and proper to grant the appellants interest for the additional compensation at the rate of 9% per annum, from the date of petition till payment.

24. The second respondent insurer shall deposit the additional compensation awarded in this appeal together with interest, before the Tribunal, within a period of three months from the date of receipt of a certified copy of this judgment. On such deposit being made by the second respondent insurer, the appellants shall be entitled to withdraw the said amount in terms of the award of the Tribunal and modified by this judgment. Before such withdrawal, the Tribunal shall collect the additional court fee payable by the appellants. The appeal is allowed as above. The parties shall suffer their costs in the appeal. T.R.RAMACHANDRAN NAIR, JUDGE ANIL K.NARENDRAN, JUDGE skj

