

The Manager Vs. S.Ummal Marjunabeevi.

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Court : Chennai

Decided On : Apr-20-2012

Judge : R.Banumathi; M.Sathyanarayanan, Jj.

Acts : Indian Penal Code (IPC) - Sections 279, 304 (A); Motor Vehicles Act - Section 163-A

Appeal No. : Cross Objection No.34, 35 of 2008 in C.M.A.(MD)Nos.461, 462 of 2008

Appellant : The Manager

Respondent : S.Ummal Marjunabeevi.

Advocate for Pet/Ap. : Mr.B.Vijay Karthikeyan, Adv.

Judgement :

R.BANUMATHI,J

1. Being aggrieved with the quantum of compensation of Rs.14,00,000/- awarded for the death of the deceased Shajahan and Rs.1,64,500/- for the death of the deceased Asif Ahamed, Appellant-Insurance Company has preferred C.M.A.Nos.461 and 462 of 2008.

2. Being aggrieved with the finding that the accident was not due to rash and negligent driving of the driver of the bus, insured with the Appellant- Insurance

Company and that the accident was due to the negligent riding of the two wheeler by the deceased Shajahan (M.C.O.P.No.91 of 2006), Claimants have preferred Cross Objection No.34 of 2008 in C.M.A.No.461 of 2008.

3. Being dissatisfied with the quantum of compensation awarded for the death of Minor Asif Ahamed (M.C.O.P. No.92 of 2006), Claimants have preferred Cross Objection No.35 of 2008 in C.M.A.No.462 of 2008. Since same issues are involved both in the appeals as well as in the Cross Objections, all of them were heard together and stand disposed of by this common judgment.

4. Brief facts are that on 21.5.2005, the deceased Shajahan along with his son Asif Ahamed, (aged 17 years) were travelling in a motor cycle bearing registration No.TN-45 K 8308 from Devipattinam to Ramnad. When the motor cycle was nearing Rettaikili Rice Mill in Ramnad to Devipattinam main road, a Bus bearing registration No.TN-34 B 8105 came in the opposite direction from Ramnad to Karaikudi driven in a rash and negligent manner and dashed against the Hero Honda Motor Cycle. Due to the impact, deceased Shajahan and Asif Ahamed sustained grievous multiple injuries and head injuries and died on the spot. Regarding the accident, a criminal case was registered in Crime No.286 of 2005 under Sections 279, 304 (A) of IPC (2 counts) of Kanikarai Police Station against the bus driver. The deceased Shajahan was working as an Instructor in Southern Railway - Central Government and was getting salary of Rs.7,493/- per month. Alleging that the accident was due to rash and negligent driving of the bus driver and the family has lost the support, the Claimants who are wife and minor daughter of Shajahan filed the Claim Petition M.C.O.P. No.91 of 2006 claiming compensation of Rs.14,00,000/-. For the death of Asif Ahamed, the Claimants have filed the Claim Petition M.C.O.P. No.92 of 2006 claiming compensation of Rs.6,00,000/-.

5. Resisting the Claim Petitions, Appellant-Insurance Company has filed the counter contending that at the time of the accident, the bus was parked on the northern side of Ramnad - Devipattinam road and the deceased was riding his motor cycle at a great speed from the opposite direction and while negotiating a curve, he lost his balance and dashed against the front side of the bus and both

the rider and pillion rider fell on the road and sustained head injuries and died on the spot. The accident was only due to rash and negligent driving on the part of the deceased only and therefore, the Appellant-Insurance Company is not liable to pay any compensation.

6. Before the Tribunal, both the Claim Petitions were taken up together for trial. 1st Claimant-Ummal Marjuna Beevi examined herself as PW.1. Eye- witness Sagubar Ali was examined as PW.2. On the side of the Claimants, Exs.A1 to A11 were marked. The driver of the bus was examined as RW.1. Rough Sketch of the scene of occurrence was marked as Ex.B1.

7. Upon consideration of oral and documentary evidence, the Tribunal held that there was no negligence or rashness on the part of the bus driver and that the accident was due to negligent riding of the motorcycle by the deceased Shajahan. However, the Tribunal held that the accident took place due to the use of the motor cycle and bus bearing registration No.TN-34 B 8105 and therefore, held that the owner of the bus and the Appellant-Insurance Company are jointly and severally liable to pay the compensation. Taking the monthly income of the deceased at Rs.15,000/- p.m., and deducting 1/3rd for personal expenses and adopting multiplier 15, the Tribunal has calculated the compensation of Rs.18,09,500/-, but awarded Rs.14,00,000/- as claimed in the Claim Petition. Insofar as the death of Asif Ahamed, Tribunal has taken notional income at Rs.15,000/- per annum. Deducting one-third for personal expenses and adopting multiplier 16, Tribunal awarded Rs.1,64,500/- as compensation.

8. Mr.B.Vijay Karthikeyan, learned counsel for Appellant-Insurance Company contended that when the Tribunal has recorded a finding that the accident was due to negligent riding of the motorcyclist, the Tribunal ought to have dismissed the Claim Petitions. It was further contended that Tribunal erred in saying that under Section 163-A of M.V. Act, the accident was due to the user of the vehicle and that Appellant-Insurance Company is liable to pay compensation. Insofar as the quantum of compensation, learned counsel for Appellant-Insurance Company submitted that the quantum of compensation awarded is very much on the higher side.

9. In the Cross Objection No.34 of 2008, Mr.S.Srinivasa Raghavan, learned counsel for Claimants contended that the Tribunal ought not to have believed Ex.B1-rough sketch prepared by the police personnel to decide the issue of negligence as the same does not amount to conclusive proof of negligence. Learned counsel would further submit that Tribunal ought to have kept in view that Ex.A1-FIR was registered only against the driver of the bus and that Tribunal ought to have taken into account the final report (Ex.A6) filed by the police against the bus driver and while so, Tribunal erred in saying that the accident was due to rash and negligent riding of the motorcyclist.

10.The perusal of the impugned Award, materials on record and the rival contentions, the following points arise for consideration:-

(1)Whether the Tribunal was right in saying that there was no negligence on the part of the bus driver and that the accident was only due to rash and negligent riding of the motorcyclist?

(2)Whether the deceased Shajahan who was riding the motorcycle bearing registration No. TN-45 K 8308 contributed the negligence, if so what was the percentage of his negligence?

(3)What is the quantum of compensation to be awarded to the Claimants for the death of deceased Shajahan?

(4)What is the quantum of compensation to be awarded to the Claimants for the death of deceased Minor Asif Ahamed?

11. Points No.1 and 2:-

In his evidence, P.W.2-Sagubar Ali stated that on 21.05.2005, he and his friend Jabarullah Raghuman were on their regular walking in the morning on Devipattinam Road and when they were returning near Rettaikili Rice Mill, he noticed that the bus bearing registration No.TN-34 B 8105 proceeding from Ramanathapuram to Karaikudi driven in a rash and negligent manner without sounding the horn, hit against the motorcycle which was coming in the opposite direction. Due to the accident, the persons travelled in the motorcycle thrown out

and sustained grievous injuries and died on the spot. P.W.2 stated that the accident was only due to rash and negligent driving of the bus driver. P.W.2 lodged the complaint before Kanikarai Police Station. Based on which Ex.A1-FIR was registered. P.W.2 being the eye-witness and also the complainant, much credence to be attached to his evidence.

12. The specific case of Appellant-Insurance Company is that deceased Shajahan rode the motorcycle in a rash and negligent manner and while negotiating a curve dashed against the bus which was in the bus stop. To substantiate the defence plea that the two wheeler hit against the bus which was in the bus stop on the northern side, driver of the bus was examined as R.W.1. Through R.W.1, Ex.B1-rough sketch was marked.

13. By perusal of Ex.B1-rough sketch, it is seen that deceased Shajahan was riding the motorcycle from east to west to keep its correct direction, it ought to have proceeded on the southern side. From Ex.B1 and the evidence of R.W.1, it is seen that the two wheeler swerved to the northern side. Referring to Ex.B1-rough sketch, Tribunal held that the bus driver was not responsible for the accident and that the accident was due to rash and negligent riding of the motorcyclist.

14. Motorcyclist - deceased Shajahan was proceeding from east to west. By perusal of Ex.B1-rough sketch, it is seen that the scene of occurrence/point of impact is on the northern side of the road. Motorcyclist appears to have swerved to the northern side. Merely because the point of impact was on the northern side, Tribunal appears to have arrived at the conclusion that the motorcycle came on the wrong side and that the accident was due to rash and negligent riding of the deceased Shajahan. Rashness and negligence could be ascertained from the contemporaneous documents like Observation Mahazar and Rough Sketch etc.

15. By perusal of Ex.B1-rough sketch, it is seen that at the place of accident, there is a slight curve. While negotiating the curve, in order to maintain the balance, two wheeler appears to have swerved to the northern side. It is pertinent to note that even though, the scene of occurrence is on the northern side, scene of occurrence is not on the northern extremity road. As pointed out earlier, because of the curve, while negotiating the curve the deceased Shajahan appears to have swerved to

the northern side. Tribunal did not keep in view the physical features of the scene of occurrence and the attendant circumstances.

16. The bus was coming in the opposite direction from west to east. R.W.1 who was driving the heavy vehicle ought to have taken reasonable care. R.W.1 who was driving the heavy vehicle does not appear to have taken due and reasonable care. It is pertinent to note that the FIR in Crime No.286 of 2005 (Ex.A1) was registered against the bus driver. The Charge sheet (Ex.A6) was also filed against the bus driver under Section 304(A) I.P.C. The fact that registering of FIR (Ex.A1) and filing of charge sheet (Ex.A6) against the bus driver prima facie indicates that the accident was due to rash and negligent driving of the bus driver.

17. While negotiating the curve, both the two wheeler as well as the bus ought to have taken reasonable care. R.W.1 who was driving the heavy vehicle ought to have adopted defensive driving anticipating the oncoming light vehicles coming in the opposite direction. Upon analysis of evidence and facts and circumstances of the case, contributory negligence of the deceased Shajahan is fixed at 30% and the negligence of the bus driver is fixed at 70%.

18. Referring to Section 163-A of M.V. Act, Tribunal held that the accident was due to the user of the vehicle/user of the bus and therefore, Appellant-Insurance Company was liable to pay the compensation. The said approach of the Tribunal is perverse and cannot be endorsed with. Since the contributory negligence of the deceased Shajahan is fixed at 30%, the Appellant- Insurance Company - Insurer of the bus is liable to pay compensation at 70% and Points No.1 and 2 are answered accordingly.

19. Point No.3:-

Deceased Shajahan was working as Instructor in Engineering Department in the Southern Railway. As is seen from Ex.A5-Salary slip, his gross pay was Rs.15,934/-. Tribunal after deducting Rs.1,464/- towards income tax, professional tax and other contributions, taken the monthly income at Rs.14,470/-, rounded off to Rs.15,000/-. Deducting one-third for personal expenses, Tribunal has taken the loss of dependency at Rs.10,000/- per month. Since deceased was aged 40 years,

Tribunal adopted multiplier 15 and calculated the loss of dependency at Rs.18,00,000/- (Rs.10,000 x 12 x 15) Adding conventional damages i.e. Rs.2000/- for funeral expenses, Rs.5000/- for loss of consortium and Rs.2500/- for loss of estate, Tribunal arrived at the compensation at Rs.18,09,500/-. Since in the Claim Petition (M.C.O.P.No.91 of 2006), Claimants have restricted their claim to the tune of Rs.14,00,000/-, Tribunal awarded Rs.14,00,000/-.

20. Considering the contentions of both in C.M.A.No.461 of 2008 and in the Cross Objection No.34 of 2008, the contributory negligence of the deceased Shajahan is fixed at 30%. In the light of our finding, now the question falling for consideration is what is the quantum of compensation to be paid to the Claimants for the death of deceased Shajahan. It is pertinent to note that Cross Objection No.34 of 2008 filed only regarding the finding of the Tribunal on negligence. The main point urged in the Cross Objection No.34 of 2008 is that the Tribunal ought not to have relied upon Ex.B1-rough sketch and the Tribunal failed to keep in view the registration of FIR (Ex.A1) and filing of Charge sheet (Ex.A6) against the bus driver. The Tribunal decreed the entire claim as per the Claim Petition. Evidently, there was no challenge to the quantum of compensation of Rs.14,00,000/- awarded by the Tribunal.

21. During the course of arguments, the learned counsel for Claimants vehemently contended that at the time of passing the Award by the Tribunal in 2007, the Claimants did not have benefit of Sarla Verma's case [(2009) 6 SCC 121]. He would therefore contend notwithstanding the absence of challenge to the quantum of compensation, urged us to adopt the ratio laid down in Sarla Verma's case and prayed for enhancement of compensation and prayed for suitable deduction for contributory negligence, if any. Taking us through the Award, learned counsel for Claimants would further contend that in any event, Tribunal has arrived at the compensation of Rs.18,09,500/- and thereafter restricted the claim to Rs.14,00,000/- on the ground that the compensation claimed in the Claim Petition itself is Rs.14,00,000/- and therefore urged us to take the quantum of compensation at Rs.18,00,000/- and then make deduction for contributory negligent, if any.

22. Per contra, learned counsel for Appellant-Insurance Company contended that in the Cross Objection No.34 of 2008 since there is no challenge to the quantum of compensation, Court cannot suo moto take up the quantum of compensation. Learned counsel for Appellant-Insurance Company would further contend that when the Claimants themselves have restricted their claim to Rs.14,00,000/-, Court cannot suo moto take up the issue of enhancement.

23. We are unable to subscribe the submissions of the learned counsel for Claimants in C.M.A.No.461 of 2008. As pointed out earlier, in the Cross Objection No.34 of 2008, the only challenge is on the finding regarding negligence. Absolutely, there is no challenge of quantum of compensation. In the absence of challenge regarding quantum of compensation, the Court cannot suo moto take up the issue of quantum of compensation and suo moto consider the question of awarding higher compensation and then make deduction towards the contributory negligence.

24. As pointed out earlier, Tribunal arrived at the compensation taking the income of the deceased Shajahan at Rs.15,000/- per month and deducting one-third for personal expenses, Tribunal calculated the loss of dependency at Rs.18,00,000/-. Adding the conventional damages, Tribunal awarded total compensation of Rs.18,09,500/-. Since the Claimants themselves have restricted their claim to Rs.14,00,000/-, Tribunal has awarded compensation of Rs.14,00,000/- as claimed in the Claim Petition. The same cannot be stultified in the appeal. Since contributory negligence of the deceased Shajahan is fixed at 30% and after deducting 30% i.e. Rs.4,20,000/- ($\text{Rs.14,00,000} \times 30/100 = \text{Rs.4,20,000/-}$), the Claimants are entitled to get Rs.9,80,000/- ($\text{Rs.14,00,000} - \text{Rs.4,20,000/-} = \text{Rs.9,80,000/-}$) from Appellant- Insurance Company and Point No.3 is answered accordingly.

25. Point No.4:-

At the time of accident, deceased Asif Ahamed was aged 17 years and was studying in XIth standard. Observing that deceased Asif Ahamed is a non- earning member, Tribunal has taken the notional income at Rs.15,000/- per annum. Deducting one-third for personal expenses, Tribunal has taken the loss of

dependency at Rs.10,000/- per annum. Adopting multiplier 16, Tribunal has calculated the loss of dependency at Rs.1,60,000/-. Adding conventional damages i.e. Rs.2000/- for funeral expenses and Rs.2500/- for loss of estate, Tribunal awarded total compensation of Rs.1,64,500/-. Being dissatisfied with the quantum of compensation awarded by the Tribunal for the death of deceased Asif Ahamed, Claimants have filed Cross Objection No.35 of 2008 for enhancement.

26. Learned counsel for Claimants contended that deceased Asif Ahamed was aged 17 years at the time of his death and within few years, he would have completed his studies and after his education, deceased would have contributed more and while so, his future prospects were not taken into account by the Tribunal in assessing the future loss of income. Placing reliance upon 2009 (1) TN MAC 593 (SC) [R.K.Malik and another v. Kiran Pal and others], learned counsel for Claimants contended that in the case of death of children and minors, the amount of compensation is payable depending upon the age of the deceased and the educational background of the deceased.

27. Learned counsel for Appellant-Insurance Company would contend that the quantum of compensation awarded by the Tribunal is reasonable warranting no interference.

28. Referring to Lata Wadhwa's case [2001 (8) SCC 197] and M.S.Grewal's case [2001 (8) SCC 151], in R.K.Malik case, the Supreme Court held that in the case of death of children and minors, future prospects should have been be addressed by the Courts. In Paragraph (32), the Supreme Court held as under:- 32. it is quite clear the claim with regard to future prospect should have been be addressed by the Courts below. While considering such claims, child's performance in school, the reputation of the school, etc. might be taken into consideration. In the present case, records shows that the children were good in studies and studying in a reasonably good school. Naturally, their future prospect would be presumed to be good and bright. Since they were children, there is no yardstick to measure the loss of future prospects of these children. But as already noted, they were performing well in studies, natural consequence supposed to be a bright future. In the said case, for the death of Kailash Rathi, Neena Jain and Jatish

Sharma, children in the age group of 15 - 18 years, the Supreme Court awarded Rs.3,16,000/- as compensation.

29. Deceased Asif Ahamed was aged 17 years and he was studying in XI standard. Over the years, he would have completed his studies and after his higher education, deceased Asif Ahamed would have earned the amount and would have contributed more to the family. After long years of efforts, the family was waiting to reap the benefits of their efforts and labour. Short of few years, the family has lost the grown up boy aged 17 years. In our considered view, the quantum of compensation of Rs.1,64,500/- awarded by the Tribunal is very low. In Cross Objection No.35 of 2008, Claimants have claimed enhancement of Rs.2,00,000/- apart from the compensation awarded by the Tribunal. Following the ratio in R.K.Malik case, it would be just and reasonable to award compensation of Rs.3,64,500/-.

30. Now the question falling for consideration is whether the Appellant- Insurance Company is to be directed to pay the entire compensation of Rs.3,64,500/- or whether 30% towards contributory negligence of the rider of the two wheeler is to be deducted.

31. Learned counsel for Claimants forcibly contended that the deceased Asif Ahamed was only a pillion rider in the motorcycle bearing registration No.TN-45 K 8308 and the contributory negligence attributed to the rider of the motorcycle cannot be attributed to the pillion rider and no deduction could be made for contributory negligence. Learned counsel would further contend that insofar as the bus bearing registration No.TN-34 B 8105 is concerned, the pillion rider Asif Ahamed was a third party and therefore, the owner of the bus and the insurer of the bus are liable to pay 100% compensation to the Claimants for the death of deceased Asif Ahamed.

32. The above contention appears to have attractive; but does not merit acceptance. As pointed out earlier, deceased Asif Ahamed travelled in the motorcycle as pillion rider. The dependents of deceased Asif Ahamed are to claim 30% of the compensation only from the owner and insurer of the two wheeler. Ofcourse, Shajahan was the owner of the two wheeler. It is pertinent to note that

Claimants have conveniently omitted to implead the motorcycle as well as the insurer of the motorcycle. Without impleading them as Respondents, the Claimants are not justified in contending that 100% compensation is to be paid by the insurer of the bus.

33. Learned counsel for Claimants would further contend that Appellant- insurer of the bus may be directed to pay the entire compensation amount payable for the death of the deceased Asif Ahamed and in turn Appellant may be directed to recover 30% from the owner and insurer of the motorcycle. Without impleading the motorcycle and the insurer of the motorcycle, Claimants are not justified in contending that Appellant-Insurance Company could be directed to recover 30% of the compensation from the insurer of the motorcycle. Any such direction would in gross violation of principles of natural justice. Insurance Company of the motorcycle is not known. Law cannot be construed in such a manner to fasten the liability upon the insurer of the vehicle - motorcycle (identity also not disclosed) even without impleading them as Respondents. Such contention of the Claimants is far fetched and does not merit acceptance.

34. For the death of deceased Asif Ahamed, the compensation is fixed at Rs.3,64,500/-. After proportionate deduction of 30% i.e. Rs.1,09,350/-, the Appellant-Insurance Company is liable to pay compensation of Rs.2,55,150/- (Rs.3,64,500/- - Rs.1,09,350/-).

35. Tribunal has awarded 7.5% interest per annum for the compensation awarded by it and the same is maintained. The reduced compensation amount has to be apportioned amongst the Claimants on pro-rata basis in the same ratio of apportionment as ordered by the Tribunal.

36. In the result,

(i)C.M.A. No.461 of 2008 filed by Appellant-Insurance Company and the Cross Objection No.34 of 2008 in C.M.A.No.461 of 2008 filed by the Claimants are partly allowed. Compensation of Rs.14,00,000/- awarded by the Tribunal in M.C.O.P.No.91 of 2006 is reduced to Rs.9,80,000/- payable with interest at the

rate of 7.5% per annum from the date of Petition till the date of deposit. (ii) C.M.A.No.462 of 2008 filed by Appellant-Insurance Company is dismissed and the Cross Objection No.35 of 2008 in C.M.A. No.462 of 2008 filed by the Claimants is partly allowed. Compensation of Rs.1,64,500/- awarded by the Tribunal in M.C.O.P. No.92 of 2006 is enhanced to Rs.2,55,150/- payable with interest at the rate of 7.5% per annum from the date of Petition till the date of deposit.

It was stated before us that Appellant-Insurance Company deposited the entire compensation amount along with accrued interest in both the appeals. Appellant-Insurance Company is directed to deposit the enhanced compensation in C.M.A.No.462 of 2008 within a period of eight weeks from the date of receipt of a copy of the Judgment. Claimants are permitted to withdraw the compensation amount along with proportionate accrued interest. Appellant-Insurance Company is permitted to withdraw the excess compensation amount along with proportionate accrued interest in C.M.A.No.461 of 2008.

Consequently, connected M.Ps are closed. Both parties are directed to bear their respective costs in these appeals.

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