

THE HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

M.A.C.M.A.No.1296 OF 2009

ORDER:

This appeal by the claimants, under Section 173 of the Motor Vehicles Act, 1988, (for short, "the Act"), is directed against the judgment and decree, dated 16.9.2005, in M.O.P.No.1206 of 2001 on the file of the Chairman, Motor Accidents Claims Tribunal-cum-I Additional District Judge, Visakhapatnam (for short, "the Tribunal") wherein the petition filed by the appellants/claimant Nos.1 to 5 for compensation of Rs.5,00,000/- for the injuries sustained by claimant No.1 was allowed in part granting compensation of Rs.1,12,500/- with proportionate costs and subsequent interest at 7.5% per annum from the date of the petition till the date of realization.

2. The claim petition was originally filed by Ch.Sai Satyanarayana, Driver of the ambulance/private vehicle. Claimant No.1, pending M.O.P.No.1206 of 2001, died and his legal representatives – claimant Nos.2 to 5 were brought on record as per orders in I.A.No.594 of 2004 dated 29.3.2004. Respondent Nos.1 and 2 are the owner of the opposite coming lorry bearing No.AP 27 T 4399 and the insurer.

3. The Tribunal has fixed 50% joint liability i.e., contributory negligence on the part of the ambulance driver – injured, who lost the breadth pending the claim petition, as referred supra, and 50% contribution on the part of the driver of the opposite coming lorry of respondent No.1 insured with respondent No.2. Aggrieved by the same, impugning the order, dated 16.9.2005, the present appeal is filed.

4. Learned counsel for the appellants contended in support of the grounds of appeal that the compensation of Rs.1,12,500/- towards 50% out of Rs.2,25,000/- is utterly low and fixing of contributory negligence is unsustainable and thereby, the Tribunal ought to have fixed the liability only on the lorry driver of respondent No.1 insured with respondent No.2 and could have allowed the claim under Section 166 of the Act, as prayed, for Rs.5,00,000/-.

5. So far as the contention that the injured consumed liquor at the time of accident and contributed to the accident is concerned, before commencement of evidence, since the injured died, P.W.2 - other injured in the ambulance was examined. Even, he deposed at the recall evidence stage, while admitting about consumption of liquor, as if the persons there administered them liquor, which the Tribunal came to the conclusion, no doubt, that the ordinary version to believe as engineered, should have been considered with mere proof even from the wound certificate of claimant No.1 since died of consumed liquor. The contents lead the trial Court to presume or fix 50% liability on the part of the injured of the ambulance. Learned counsel for the appellants placed reliance upon the expression in **Jiju Kuruvila and others v. Kunjujamma Mohan and others**.

6. Respondent No.1 to the claim petition – owner of the vehicle, though served, failed to attend and respondent No.2 – insurer, represented by his counsel, submits that the very claim petition awarding the compensation is not sustainable, as the injured died pending the O.P., basing on the latin maxim '*Actio personalis moritur cum persona*' but, for the loss to the estate incurred for the treatment; for pain and suffering or disability. The awarding of the compensation by the Tribunal is unsustainable and requires to be reduced from what was awarded even.

7. In reply to it, learned counsel for the appellants/claimants placed reliance on an expression of this Court in **Reliance General Insurance Co. Ltd., Secunderabad v. B.Mallaiah (died) by L.Rs. and another**. A reading of the judgment indicates that the maxim is not in strict application to the Indian Law and in particular, where the claim petition was already filed by the claimant and particularly, at para Nos.6, 8 to 11 and 17, it is observed that the Supreme Court, in **Official Liquidator of Supreme Bank Limited v. P.A.Tendolkar** [(1973) 1 SCC 602], held that the maxim had no application to actions based on contracts or where the estate of the tort feaser had benefited from a wrongdoer. In fact, that expression is not applicable to the facts on hand as it is motor accidents claim and not a contractual liability, much less any tort feaser is benefited by the wrong doer, but for, the driver is sufferer in facing the criminal prosecution for rash and negligent driving, particularly, the lorry driver impugned. In the expression, however, referring to Section 306 of the Indian Succession Act, 1925, it is observed that when the injured was alive by the time he

made the claim and sought compensation for pain and sufferance, the petition is maintainable. At para No.17, the further observation is as under:

“.....I am afraid in view of the operation of the doctrine actio personalis moritur cum persona read with Section 306 of the Indian Succession Act, 1925 the claim of pain and sufferance cannot be rejected on the ground that the 1st petitioner who sustained injuries is no more. The claim certainly is maintainable by the 1st petitioner and consequently, by the petitioners 2 and 3 on the demise of the 1st petitioner.....”

As against the claim of compensation for Rs.2,00,000/-, the trial Court therein awarded compensation of Rs.84,000/-. An amount of Rs.5,000/- towards medical expenses, Rs.10,000/- towards loss of salary, Rs.54,000/- towards permanent disability, Rs.10,000/- towards pain and sufferance and Rs.5,000/- towards extra nourishment, attendant charges, transport charges and damages to the clothes were awarded.

8. Section 306 of the Indian Succession Act reads as under:

“306. Demands and rights of action of are against deceased survive to and against executor or administrator:--- All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, 1860 (45 of 1860), or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.”

Thus, it speaks of demise whatever and of rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease survive. Here, the point is even from Section 306 of the Indian Succession Act, what is entitled is only loss of estate or the pain and sufferance of the injured in his life time had it been to award even after his death to the legal representatives who are not the sufferers. However, as held in **Reliance General Insurance Co.Ltd.**, (2 supra), here also, the injured himself filed the claim petition and held

once the claim is filed, it will survive the cause of action. Had it been not filed in his life time, it could be a different proposition, as also held in the expression supra. Thus, from the above, the claim for injuries, pain and sufferance also survives after death of injured once claim is filed in his life time, even death is not connected to the accident injury.

9. Having regard to the above, coming to the other contention of the learned counsel for the appellants/claimants of fixing of 50% contributory negligence is unsustainable is concerned, it is not in dispute that even P.W.2 – the so called eye witness and one of the injured, deposed that himself and the deceased driver of the ambulance consumed liquor. Even the recall examination on his part by the claimants remained the same but for the attempt to explain as if persons nearby cause administered the liquor to them. The Tribunal rightly not believed the same. Once that is the admission, the very claimants - witness confirmed the factum of alcohol consumed by the driver and the same is also substantiated by the claimants' document which is the wound certificate and that is not even disputed by the claimants. In **Jiju Kuruvila and others** (1 supra), coming to its facts, the trial Court, in the matrix of facts, fixed liability on the opposite vehicle and not on the deceased driver of the other vehicle involved and it is the High Court, while reversing the trial Court's judgment, observed that the scene observation report speaks about the condition of the vehicles and Post Mortem Report speaks that the deceased consumed alcohol. The Apex Court, while reversing the High Court's finding, came to a definite conclusion against the reasoned judgment of the trial Court that mere scene observation report is not the criteria so also the alcoholic contents found in the post mortem report to fix compensation, but for any other evidence and as there is nothing more even to interfere with the Tribunal's finding by the High Court, held by confirming the Tribunal's finding. The principle is correct but the facts are different, as discussed supra. Now, in the facts on hand, P.W.2 - own witness of the claimants admitted twice at the second time coming to the witness box apart from wound certificate of claimant No.1 since died, also undisputedly, contains the alcoholic contents of consumption of liquor at the time of incident vide Ex.B-1 and it is not in dispute by the claimants. Having regard to the above, once the Tribunal, having come to the conclusion of contributory negligence equally on the two vehicles including the vehicle driven by the deceased i.e., the ambulance, as the main

negligence is on the part of the lorry driver also, but for to reduce from 50% to 40% there is nothing more to interfere.

10. Now, coming to the quantum, the Tribunal already arrived to the amount by taking the permanent disability. As referred in **Reliance General Insurance Co. Ltd.**, (2 supra), once claim petition was filed by the injured, the cause of action can be continued by the legal representatives as an actionable claim against the respondents including for pain and sufferance and thereby, there is nothing to interfere on the quantum arrived at Rs.2,25,000/- but for to say, instead of 50% out of it, 60% liability is to be fixed on the respondents.

11. No doubt, it is the contention of the learned counsel for the appellants that the death of appellant No.1 was due to the injuries sustained by him in the accident. Basically, that is neither the pleading by amendment of the claim petition nor evidence much less supported by any medical evidence including of P.W.3 – Dr.T.V.Ramana Murthy much less with regard to Ex.X-1. Hence, the same is liable to be negatived.

12. Accordingly, the M.A.C.M.A. is allowed in part by enhancing the compensation from Rs.1,12,500/- to Rs.1,35,000/-. There shall be no order as to costs.

13. Miscellaneous petitions pending, if any, in this appeal shall stand closed.

Dr. JUSTICE B.SIVA SANKARA RAO

Date:17.11.2015

AMD

THE HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

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