

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

M.A.C.M.A.No. 1787 of 2013

Between:

P.Suneela and others

..... APPELLANTS

VERSUS

Shaik Kamal and another

..... RESPONDENTS

JUDGMENT PRONOUNCED ON : 07.09.2018

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE SMT. JUSTICE T. RAJANI

1. Whether Reporters of Local : Yes/ No
newspapers may be allowed to see
the Judgment ?
2. Whether the copies of judgment may : Yes/ No
be marked to Law Reporters/ Journals
3. Whether Their Ladyship/ Lordship wish : Yes/ No
to see the fair copy of judgment

C. PRAVEEN KUMAR, J

T. RAJANI, J

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

HON' BLE SMT. JUSTICE T. RAJANI

M.A.C.M.A.No. 1787 of 2013

ORDER :

%Dated 07.09.2018

P.Suneela and three others

..... APPELLANTS

VERSUS

\$ Shaik Kamal and another

.... RESPONDENTS

! Counsel for Appellants : Sri Kota Subba Rao

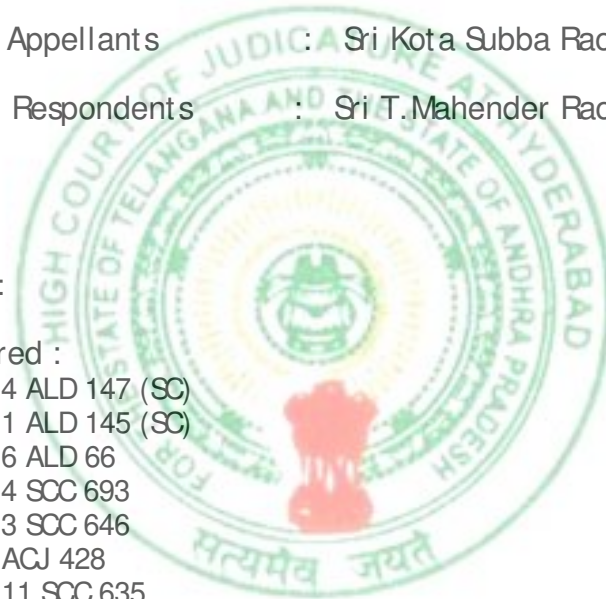
^ Counsel for Respondents : Sri T.Mahender Rao

< GIST :

> HEAD NOTE :

? Cases referred :

1. (2012) 4 ALD 147 (SC)
2. (2018) 1 ALD 145 (SC)
3. (2012) 6 ALD 66
4. (2011) 4 SCC 693
5. (2011) 3 SCC 646
6. (2001) ACJ 428
7. (2011) 11 SCC 635
8. (2017) ACJ 2700
9. (2009) 6 SCC 121



HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

HON' BLE SMT. JUSTICE T. RAJANI

M.A.C.M.A.No. 1787 of 2013

JUDGMENT : (per Hon' ble Sri Justice C.Praveen Kumar)

1) Aggrieved by the award and decree dated 17.06.2013 passed in M.V.O.P.No.125 of 2011 on the file of the Chairman, Motor Accidents Claims Tribunal-cum-I Additional Chief Judge, City Civil Court, Secunderabad, wherein the Tribunal dismissed the claim of the claimants, the present appeal is filed by the claimants under Section 173 of the Motor Vehicles Act, 1988 (for short "the Act").

2) For the sake of convenience, the parties will hereinafter be referred to as arrayed in M.V.O.P.

3) The facts in issue are as under:

The appellants herein are the claimants. The first claimant is the wife and claimant Nos.2 and 3 are the two minor daughters while claimant No.4 is the father of one P.Ganesh Reddy (hereinafter referred to as "the deceased"). A claim-petition under Section 166 of the Act, claiming compensation of Rs.36,00,000/-, came to be filed stating that on 18.10.2010 at about 5.30 p.m., while the deceased

was proceeding on his motor cycle bearing registration No. AP 28 BD 4622 slowly on the extreme left side of the road from JNTU towards Hitech City and when he reached near RTO Office, 4th phase, KPHB Colony, the driver of an auto bearing registration No. AP 28 TB 3035, drove the same in a rash and negligent manner and at high speed, came in opposite direction on a wrong side and dashed the motor cycle of the deceased, as a result of which, the deceased fell down and sustained injuries. Immediately thereafter, he was shifted to Remedy Hospital and from there to NIMS Hospital, Panjagutta, Hyderabad, where he succumbed to injuries on 19.10.2010. The motor cycle of the deceased was also damaged. In respect of the said incident, a case in Crime No.424 of 2010 came to be registered against the driver of the said auto, for an offence punishable under Section 304-A IPC. Having regard to the age of the deceased; his employment as Area Sales Manager in Neon Laboratories Limited, Hyderabad and earning at Rs.30,000/- per month besides other perks, the claimants sought compensation of Rs.36,00,000/- against the respondents 1 and 2, who are the owner and insurer of the auto, respectively.

4) In spite of service of notice on the 1st respondent, there was no representation. Hence, he was set exparte.

5) A counter came to be filed by the 2nd respondent, disputing the manner in which the accident took place. It is stated that the accident occurred due to negligence of the rider of the motor cycle ie., deceased and as such the insurance company is not liable to pay the compensation.

6) Basing on the above pleadings, the Tribunal framed the following issues:

1. Whether the pleaded accident occurred resulting in death of the deceased viz., P.Ganesh Reddy due to the rash and negligent driving of the vehicle (Auto) bearing No.AP 28 TB 3035 by its driver?
2. Whether the petitioners are entitled to any compensation and if so, at what quantum and what is the liability of the respondents?
3. To what relief?

7) In support of their case, the claimants examined PWs. 1 to 3 and got marked Exs.A1 to A9 and Exs.X1 and X2. No oral or documentary evidence was adduced on behalf of the respondents but Ex.B1-a copy of insurance policy came to be marked with consent.

8) Basing on the evidence available on record, the Tribunal held that the claimants failed to prove that the auto bearing No. AP 28 TB 3035 was involved in the

accident. While deciding the issue as to the amount of compensation to which the claimants are entitled, it was held that a sum of Rs.26,45,984 / - can be granted towards compensation. In view of the findings with regard to the manner in which the accident took place, the Tribunal held that the claimants are not entitled to claim any compensation against the respondents. Challenging the same, the claimants preferred the present appeal.

9) Sri Kota Subba Rao, learned counsel for the claimants mainly submits that the finding of the Tribunal in holding that the claimants have not proved their case beyond doubt is incorrect. According to him, it is sufficient if the case is proved on the touchstone of probabilities. Since the involvement of the auto is not in dispute and having regard to the material on record, more particularly the nature of injuries sustained by the deceased, it can be said that the accident in question took place due to the hit by an auto. He further submits that the finding of the Tribunal is totally contrary to the averments in the counter filed by the respondents in O.P. Much stress is laid by the counsel on the averments made in the counter filed in O.P. and also the allegations made in the charge sheet to establish the involvement of the crime vehicle in the accident.

10) On the other hand, Sri T.Mahender Rao, learned counsel appearing for the insurance company would submit that there is absolutely no material on record to show the involvement of the auto in causing injuries to the deceased. According to him, the version set out in the charge sheet and the version which is spoken to by the alleged eye witness is totally inconsistent with each other and the same cannot be made the basis to award compensation. He took us through the averments in the charge sheet and the evidence of PW.2 to establish his plea. Insofar as the averments in the counter, he pleads that taking a plea in the counter does not amount to admission and the argument of the learned counsel for the appellant that the insurance company is liable to pay compensation on that score has to be rejected. He also submits that if really, the auto was involved in the accident, definitely there would have been some damage to the auto, having regard to the version of PW.2, which according to him is lacking in the instance case.

NATURE OF PROOF REQUIRES TO PROVE AN ACCIDENT:

11) In *Bimla Devi and others v. Himachal Road Transport Corporation and others*¹ the Apex Court while dealing with the nature of proof that is required to prove an accident observed as under:

¹ (2012) 4 ALD 147 (SC)

“15. xxxxx “the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties.”

12) In *Halappa v. Malik Sab*² a three Judge Bench of the Apex Court, observed as under:

“The High Court has proceeded to reverse the finding of the Tribunal purely on the basis that the FIR which was lodged on the complaint of the appellant contained a version which was at variance with the evidence which emerged before the Tribunal. The Tribunal had noted the admission of RW1 in the course of his cross-examination that the insurer had maintained a separate file in respect of the accident. The insurer did not produce either the file or the report of the investigator in the case. Moreover, no independent witness was produced by the insurer to displace the version of the incident as deposed to by the appellant and by PW 3. The cogent analysis of the evidence by the Tribunal has been displaced by the High Court without considering material aspects of the evidence on the record. The High Court was not justified in holding that the Tribunal had arrived at a finding of fact without applying its mind to the documents produced by the claimant or that it had

² (2018) 1 ALD 145 (SC)

casually entered a finding of fact. On the contrary, we find that the reversal of the finding by the High Court was without considering the material aspects of the evidence which justifiably weighed with the Tribunal.

We are, therefore, of the view that the finding of the High Court is manifestly erroneous and that the finding of fact by the Tribunal was correct.”

13) In *Oriental Insurance Co. Ltd., Kurnool v. Muchinthala Bharathamma and others*³ the issue before the Court was “Whether the claim requires to be rejected since the vehicle number was not mentioned in the first information report and the identification of the vehicle was done after thorough investigation by the police”. Relying upon the judgment of the Apex Court in *Ravi v. Badrinarayan and others*⁴ and *Kusum Lata and others v. Satbir and others*⁵ a learned Single Judge of this Court held as under:

“Therefore, in this case there is highly reliable and convincing evidence in proof of the fact that the accident was due to rash and negligent driving of the Tempo Trax AP.21C.7803. Merely because the number of the offending vehicle was not mentioned in the First Information Report it cannot be said that the offending vehicle namely the Tempo Trax AP. 21C. 7803 was not involved in the accident. The learned Tribunal rightly held, basing on the evidence before it

³ (2012) 6 ALD 66

⁴ (2011) 4 SCC 693

⁵ (2011) 3 SCC 646

that the accident was due to the rash and negligent driving of Tempo Trax bearing No. AP.21C. 7803 and the said finding does not call for any interference in this appeal.”

14) In *Kaushnuma Begum and othes v. New India Assurance Co.Ltd., and others*⁶, the Apex Court dealt with an issue as to “whether the jurisdiction of Tribunal is not restricted only to decide the claims arising out of negligence in use of the motor vehicles”. After considering the law laid down on the said aspect, the Apex Court held as under:

“Hit and run cases where the drivers of the motor vehicles who have caused the accidents are not known are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist whether negligently or not, he or his legal representatives as the case may be should be entitled to recover damages if the principle of social justice should have any meaning at all. In order to meet to some extent the responsibility of the society to the deaths and injuries caused in road accidents there has been a continuous agitation throughout the world to make the liability for damages arising out of motor vehicles accidents as a liability without fault.

Like any other common law principle, which is acceptable to our jurisprudence, the Rule in *Rylands vs. Fletcher* can be followed at least until any other new principle which excels the former can be evolved, or until legislation provides differently.

⁶ (2001) ACJ 428

Hence, we are disposed to adopt the Rule in claims for compensation made in respect of motor accidents.

No Fault Liability envisaged in Section 140 of the MV Act is distinguishable from the rule of strict liability. In the former the compensation amount is fixed and is payable even if any one of the exceptions to the Rule can be applied. It is a statutory liability created without which the claimant should not get any amount under that count. Compensation on account of accident arising from the use of motor vehicles can be claimed under the common law even without the aid of a statute. The provisions of the MV Act permits that compensation paid under no fault liability can be deducted from the final amount awarded by the Tribunal. Therefore, these two are resting on two different premises. We are, therefore, of the opinion that even apart from Section 140 of the MV Act, a victim in an accident which occurred while using a motor vehicle, is entitled to get compensation from a Tribunal unless any one of the exceptions would apply. The Tribunal and the High Court have, therefore, gone into error in divesting the claimants of the compensation payable to them.”

15) In *Parmeshwari v. Amirchand*⁷ the Apex Court was dealing with a situation where on 22.01.2003 at about 12.00 noon the appellant therein, the claimant before the Tribunal, respondent No.1 before the High Court, was going from Baganwala to Tosham on a Motor Cycle (No.HR 16G-8379), driven by Balwan with the claimant on the pillion

⁷ (2011) 11 SCC 635

seat. When the Motor Cycle was half a kilometer away from Baganwala, Suresh - respondent No.2 herein, came from the other direction in another scooter (No.HR 20-5793) from the wrong side and hit on the right leg of the appellant, as a result of which she fell down leading to fracture of her right leg apart from receiving multiple injuries. It has come in evidence of PW.2-Dr. Parveen Chawla that on 22.1.2003 the appellant was admitted with diagnosis of fracture of tibia. Plating and bone grafting was done by P.W.2-Dr. Parveen Chawla and the appellant was discharged on 6.2.2003. The discharge card was also proved. PW.3-Satbir Singh, deposed that the appellant moved a complaint in the office of SSP Hisar on 11.3.2003 and the same was sent in original on 2.4.2003 by SSP Hisar to SSP Hanumangarh. The other reason in the High Court's order was that as the claim petition was filed after four months of the accident, the same is "a device to grab money from the insurance company". The Apex Court held that this finding in the absence of any material is certainly perverse. The Court held that the High Court appears to be not cognizant of the principle that in a road accident claim, the strict principles of proof in a criminal case are not attracted.

16) In view of the judgments referred to above and the principles laid down by the Apex Court and our High Court,

in the judgments referred to above, it is to be decided whether the claimants have proved the involvement of the auto in the accident?

17) The first information report which lead to registration of the case in Crime No.424 of 2010 of KPHB Police Station, for an offence punishable under Section 304-A IPC, came to be issued basing on an information furnished by one Pamireddy Sudheer Reddy, against the driver of the auto. It is said that on 18.10.2010 at about 5.30 p.m., the informant's brother by name Ganesh Reddy while crossing the road on his motor bike near RTO Office, KPHB Colony, the driver of the auto drove the auto in a rash and negligent manner and dashed against the bike, as a result of which he received bleeding injuries and died on 19.10.2010. Police investigated into the said crime, examined about 12 witnesses and filed a charge sheet stating that at the time of the accident, the auto rickshaw bearing No.AP 28 TB 3035 was coming from Hi-tech city road towards JNTU Cross Roads, driven by its driver in a rash and negligent manner and dashed against the vehicle of the deceased. As a result of which he fell down on the road and went into an unconscious condition. It is to be noted here that the averments in the first information report and the charge sheet, show the involvement of the auto in the accident and

the driver of the auto was found to be driving the said vehicle in a rash and negligent manner and it was he who hit the vehicle driven by the deceased.

18) The said version with regard to the involvement of the auto and its driver driving the said vehicle in a rash and negligent manner was also spoken to by the eye witness examined by the claimants herein, who was also shown as an eye witness in the charge sheet filed by the police. It would be useful to refer to the evidence of PW.2 (eye witness in OP), which is as under:

“On 18.10.2010 at about 5.30 p.m., while I was working in Laxmi Durga Mechanic Shop, Phase-IV, KPHB Colony, one person by name P.Ganesh Reddy was proceeding on motor cycle bearing No. AP 28 DD 4622 from JNTU towards Hi-tech city road, when he reached in front of our shed at RTO Office, suddenly one auto bearing No. AP 28 TB 3035 came in a rash and negligent manner in high speed and dashed to the motorcyclist. Due to which Mr. P.Ganesh Reddy, sustained fatal injuries, myself and others have gathered there and informed the same to his relatives by his phone and they have shifted him to NIMS Hospital and came to know that Mr. P.Ganesh Reddy, succumbed to his injuries while undergoing treatment on 19.10.2010.”

19) As seen from the evidence of PW.2, on 18.10.2010 at about 5.30 p.m., while he was working in Laxmi Durga

Mechanic Shop, Kukatpally, one person by name P.Ganesh Reddy, was proceeding on motor cycle bearing No. AP 28 DD 4622 from JNTU towards Hi-tech city and when he reached infront of their shed, an auto bearing No. AP 28 TB 3035, driven by its driver in a rash and negligent manner came and dashed the motor cyclist. As a result of which the deceased fell down and sustained injuries. PW.2 informed the same to his relatives over phone and basing on the information furnished by the deceased, who shifted him to the hospital, where he succumbed to injuries. He further states that a case was registered against the driver of the crime vehicle.

20) PW.2 was cross-examined at length. To a suggestion that he was not an eye witness to the incident and that he was deposing falsely, was denied by him. Though he admits that he did not file any documents evidencing his employment in mechanic shed, but categorically states that he is working as Mechanic in Laxmi Durga Mechanic Shop. It has been elicited that the accident took place at a distance of 10 mts., from the mechanic shop. It was also elicited that he noted down the auto number. On seeing the incident, himself and others rushed to the spot and for some time the injured was conscious. During that time, he informed the name and requested the people gathered there to inform his relatives through his cell phone. He further

states that he has informed the auto number to the police, but does not remember as to the number of persons travelling in the auto. To a suggestion that the accident occurred only due to rash and negligent act of the motor cyclist, was denied. From the evidence on record, it is clear that he was not only shown as an eye witness to the incident in the charge sheet (LW3) but was examined by the claimants to prove the involvement of the auto. The only suggestion given to disprove his presence appears to be that he was not working in mechanic shop, as no proof was filed to support the same. PW.2, who was aged about 20 years, was working as a mechanic in a mechanic shop and to insist on a proof evidencing his employment as a mechanic would be very far fetched.

21) The reason for disbelieving the incident appears to be that if really PW.2 has seen the incident, he would have definitely informed the police about the vehicle number and the same would have found place in the first information report, which was sent three days after the incident. But it is to be noted here that though there is a delay of about three days in sending the F.I.R., to the Court, but the first information report was given on the next day at 2.00 p.m. The family members of the injured would have been more concerned with the health of the injured rather than

informing the police about the accident. In cases of this nature, one cannot find fault with the delay in lodging the report, which in our view is also not abnormal. Since the informant, who lodged the report, is not an eye witness to the incident and his source of information is the information gathered from the scene, non-mentioning of the auto number cannot be found fault. The averments in the charge sheet, indicate that PW.2 was examined long after lodging of the report, ie., when they went to the scene of offence after registering the crime. When the answers elicited in the cross-examination of PW.2, were to the effect that he noted down the auto number and informed the same to the police, one cannot find fault with the police in tracing out the vehicle.

22) The argument of the learned counsel for the insurance company is that when the evidence of PW.2 in the cross-examination is to the effect that the auto dashed against the motor cycle and vanished from the accident site, it would be difficult for him to remember the auto number. It is urged that since the first information report is silent as to the involvement of the auto and having regard to the fact that the auto was not damaged, pleads that auto as a crime vehicle was set up at a later point of time.

23) It is to be noted that having elicited an answer from PW.2 that the auto got vanished from the site after the incident, there was no necessity for the counsel for the insurance company to ask him as to whether he noted down the auto number. To the question as to whether he noted down the auto number, the witness positively states that he has noted down the auto number and intimated the same to the police. He however rightly states that he does not remember whether the auto number was mentioned in the statement, since the first information report was not given by PW.2, but the brother of the deceased, who lodged the report basing on the information furnished by PW.2. Even in the charge sheet, the brother of the deceased, who lodged the report, was not shown as an eye witness to the incident. Only PW.2 and two others namely Md. Ishaq Ali and Md.Azmath were shown as an eye witnesses to the incident. Therefore, the presence of PW.2 at the site and he witnessing the incident cannot be doubted. Hence, we hold that the evidence on record amply establish the involvement of the auto in the accident.

24) With regard to the finding of the Tribunal that if really PW.2 has mentioned the number of the auto in his 161 Cr.P.C. statement, the claimants ought to have produced the statement in support of their case that the averments in

the charge sheet do not refer to examination of PW.2 as LW.3 in the charge sheet, on the date of accident or on any other day shortly muchless before 04.11.2010 on which date the driver of the auto was arrested, it is to be noted that these findings on the face of it are incorrect. Firstly, if the version of PW.2 with regard to he noting down the vehicle number and informing the same to the police is doubted, nothing prevented the insurance company to confront PW.2 with his earlier statement. The insurance company could have obtained a copy of the statement and confront the version therein to PW2. On the other hand, their own counsel in the cross-examination of PW.2, elicited answers which establish the case of the claimants with regard to involvement of the auto No. AP 28 TB 3035. Having elicited the answers, one cannot now go back and doubt the version of PW.2. Further, as held by us earlier, Ex.A1 was not given by PW.2. So, non-mentioning of the auto number in the first information report in our view cannot be given much weight to doubt the case of the claimants, more so, when the claimants have to prove their case on the touchstone of preponderance of probabilities.

25) The comment with regard to non-examination of PW.2 immediately after the accident, the averments in page No.2 of the charge sheet, would show that after handing over the

dead body of the deceased for completing the final rites under proper acknowledgment, LW.11 along with LWs.7 and 8 proceeded to the scene of offence, inspected it minutely, examined LWs.3 to 5 (PW.2 and others), recorded their statements in detail and incorporated the same in the case diary. The charge sheet further shows that after recording the statement of the witnesses, the accused was arrested on 04.11.2010. Therefore, the finding that the arrest of the accused and recording of the statement happened simultaneously appears to be incorrect.

26) Insofar as the comment with regard to crime vehicle having no damage marks, it is to be noted that the incident in question took place on 18.10.2010, the accused was arrested on 04.11.2010 and thereafter the vehicle was seized from the owner on 16.11.2010. Firstly, when the version of PW.2 and the averments in the charge sheet show that after causing the accident, the vehicle left the scene, later one cannot assume the nature of damage done. Secondly, nearly a month later the vehicle came to be seized, by which time the possibility of damage, if any, caused to the vehicle getting repaired/ rectified cannot be ruled out, more so when the driver is not the owner of the vehicle.

27) Therefore, the finding of the Tribunal expressing a doubt about the involvement of the vehicle as it is not having any body dents on the auto at the time of its examination by the M.V.I., cannot be given importance to throw out the claimants' case. It is no doubt true that in the charge sheet there is a sentence stating that the auto rickshaw got rolled over on the road. Even assuming that it is correct, but the averments in the very same charge sheet show that the vehicle left the scene of offence after hitting the deceased. Therefore, this inconsistency, if any, cannot be magnified to say that once the vehicle got rolled over, the damages would be more, which would be evident even on the date of seizure. If really the damage was such, then it could not have left the scene after the accident. Therefore, in our view this discrepancy cannot be given much importance as the averments in the charge sheet explain the same. Further, there was sufficient time for the owner of the auto, to get the body dents repaired.

28) Coming to the averments made in the counter filed in the O.P., some inconsistent pleas are taken. Though in para No.7, the insurance company pleads about the contributory negligence of the rider of the motorcycle but in para No.9 an alternate plea was taken with regard to involvement of the auto and the driver of the auto not having a valid driving

licence. But in view of the above findings, it may not be necessary for us to go into the said aspect.

29) Coming to the quantum of compensation as against the claim of Rs.36,00,000/-, it is to be noticed though the Tribunal has rightly fixed the net salary of the deceased at Rs.20,040/- after deducting transport allowance and dress allowance, but added only 30% of the future prospects. In view of the judgment of the Apex Court in *National Insurance Co. Ltd., vs. Pranaysethi and others*⁸, 40% to the income of the deceased has to be added for calculating loss of earning towards future prospects, when there is fixed income and the age of the deceased being below 40 years. Admittedly the deceased was having fixed income and he was aged about 33 years at the time of accident. Therefore, taking the income of the deceased at Rs.20,040/-, as fixed by the trial Court and if 40% of the income is added to the actual income of the deceased towards future prospects, the total income of the deceased would be Rs.20,040/- + Rs.8,016/- = Rs.28,056/- per month. After deducting 30% towards income tax, the income would be Rs.19,639/-. In view of the judgment of the Apex Court in *Sarla Verma v. Delhi Transport Corporation*⁹, the Tribunal rightly applied multiplier '16' which needs no interference. After

⁸ (2017) ACJ 2700

⁹ (2009) 6 SCC 121

deducting 1/4th amount towards his personal and living expenses, the contribution of the deceased would be Rs.14,729/- per month. Applying multiplier '16', the total loss of dependency would be Rs.14,729/- x 12 x 16 = 28,27,968/-. Apart from that the claimants also entitled Rs.70,000/- under conventional heads as per the judgment in Pranay Sethi case (8 supra). Thus in all the claimants are entitled to Rs.28,97,968/- as compensation.

30) For the aforesaid reasons, the appeal is allowed enhancing the compensation from Rs.26,45,984/- to Rs.28,97,968/- together with interest at 6% p.a. from the date of petition till the date of realization, payable by respondents 1 and 2 jointly and severally. There shall be no order as to costs. Miscellaneous petitions pending in this appeal, if any, shall stand closed.

C. PRAVEEN KUMAR, J

T. RAJANI, J

07.09.2018

Note: L.R. copy to be marked

B/ o
gkv