

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA

Namal Aracchige Namal
Thilakaratne
No.134/A
Matha Road, Manning Town,
Elvitigala Mawatha
Colombo 8

Plaintiff

SC Appeal No.49/2011 and
SC Appeal No 50/2011
SC/HCCA 282 & 283/2010
WP/HCCA/COL/282 and 283/2007(F)
DC Colombo Case Nos. 32097/MR and 35368/MR

-Vs-

1. W.V.R.Somaratne
Walpola Junction
Welagedara,
Attanagalle
2. R.P.T.N.H.Ranasinghe
Ranssinghe Construction
No.15/8
Veediyyaratne Road
Gampaha

Defendants

AND

1. W.V.R.Somaratne
Walpola Junction
Welagedara,
Attanagalle

2. R.P.T.N.H.Ranasinghe
Ranssinghe Construction
No.15/8
Veediyaratne Road
Gampaha
Defendants-Appellants

Namal Aracchige Namal
Thilakaratne
No.134/A
Malta Road, Manning Town,
Elvitigala Mawatha
Colombo 8

Plaintiff-Respondent

AND NOW BETWEEN

In the matter of an application for Leave to appeal in terms of section 5C of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by Act no.54 of 2006.

1. W.V.R.Somaratne
Walpola Junction
Welagedara,
Attanagalle

2. R.P.T.N.H.Ranasinghe
Ranssinghe Construction
No.15/8
Veediyaratne Road
Gampaha
Presently at No.12, Church
Road, Gampaha.

Defendants-Appellants-Petitioners

-Vs-

Namal Aracchige Namal
Thilakaratne
No.134/A
Matha Road, Manning Town,
Elvitigala Mawatha
Colombo 8

Plaintiff-Respondent-Respondent

Before: Eva Wanasundera PC,J
Buwaneka Aluwihare PC,J
Sisira J. De Abrew J

COUNSEL: Nihal Fernando PC. With Viran Fernando for the Defendant-
Appellant-Appellants.
Amrit Rajapakse for the Plaintiff-Respondent-Respondent

ARGUED ON: 08-12-2015

WRITTEN SUBMISSIONS ON: 18TH -12-2015

DECIDED ON: 15-11-2016

Aluwihare PC,J

When leave to appeal applications in SC.HC.CALA/282/2010 and SC HC/CALA 283/2010 were supported on 2nd October,2011 leave was granted on identical questions of law and the applications referred to above were assigned the numbers Appeal 49/2011 and Appeal 50/2011, respectively.

When these matters were taken up for hearing, parties agreed to have both appeals consolidated and invited court to decide the issues in both appeals in a single judgment. Similarly, the High Court of Civil Appeals also had consolidated the two appeals that came up before it from the decisions of the District Court and had pronounced one judgment.

Both these matters referred to above stem from the same incident, a tragic motor vehicle accident that resulted in the death of one Samantha Padmakeshi Senadheera.The deceased happened to be the husband of the Plaintiff-Respondent-Respondent in Appeal No. 49/2011 and the mother of the Plaintiff-Respondent-Respondent in Appeal No.50/2011.

The Plaintiff-Respondents (hereinafter referred to as Plaintiffs) initiated separate proceedings before the District Court of Colombo under case Nos. 32097/MR and 35368/MR.

In case No.32097/MR, by her judgment dated 26th July,2007, the Learned District Judge awarded the entirety of the damages claimed by the husband of the deceased and awarded him Rs.5 million as damages. The said amount is constituted of two components, that is Rs.3.00 million as pecuniary loss and Rs.2.00 million for loss of love and affection.

In the other case (i.e.. 35368/MR) the Learned District Judge awarded the daughter of the deceased, again the entire sum claimed by her as damages and

the amount so awarded was Rs.3.00 million. This amount also consists of pecuniary loss of Rs.1.5 million and Rs.1.5 million for loss of love and affection.

The defendants Appellant Petitioners(hereinafter referred to as Appellants) appealed against both these orders and as referred to earlier both appeals were consolidated and a single judgment was delivered by the High Court of Civil Appeals.The present appeal before this court impugnes the judgement delivered by the High Court of Civil Appeals.

Before I deal with the questions of law on which leave was granted it would be pertinent to place the issues that were raised.

It was the contention of the Appellant that the District Judge erred in law by misdirecting herself, in holding that plaintiffs suffered damages in a sum of Rs.2.00 million and 1.5 million, respectively for loss of “love and affection”. The basis for this assertion is that, the aquilian action under Roman Dutch Law, permits granting only of damages for pecuniary loss and not for loss of love and affection.

In fact both in the High Court of Civil Appeals as well as before this Court the appellant did not contest their liability for pecuniary damages and in the course of the hearing the learned President’s Counsel contended that his client is agreeable to pay the entirety of the damages awarded to both plaintiffs as pecuniary loss.

When the matter came up before the High Court of Civil Appeals, in the consolidated appeal judgment, the High Court brought down the aggregate damages from Rs.8.00 million to Rs.5.00 million in both cases.The judgement of the High Court however does not clearly state as to the basis for this reduction in the damages awarded. I shall, however, advert to the judgment of the High Court of Civil Appeals later in this judgment. It is significant to note that there

was no appeal by either of the Plaintiffs against the judgment of the High Court of Civil Appeals.

The Appellants had moved this court by way of leave to appeal and leave was granted by this Court on the questions of law referred to in sub paragraphs 1 to 4 of paragraph 16 of the Petition of the Petitioners dated 12th August,2010 which are reproduced below:

- (1) Is the Plaintiff in an *aquilian action* for recovery of damages for death of his wife, entitled to recover damages for loss of comfort and protection from the said wife or *solatium* for “*loss of consortium*”?
- (2) have the Learned High Court Judges erred in law, in granting damages for the “*loss of comfort and protection*” when there was no issue raised on the said category of damages by the Respondent?
- (3) Is the method of calculation of future earning by the deceased adopted by the Learned Additional District Judge and/or the Learned High Court Judges, correct in law?
- (4) Have the Learned High Court Judges erred in law, in awarding interest at the rate of 12% per annum contrary to provisions of section 192 of the Civil Procedure Code?

At the hearing of the appeal the learned counsel for the Respondents conceded that the plaintiffs would be entitled only to the applicable legal interest and not 12% per centum, as awarded by the High Court of Civil Appeals.

The Appellants at the stage of hearing did not challenge the determination of both courts with regard to awarding of damages for pecuniary loss. The main thrust of the argument on behalf of the Appellants was that the District Court could not have granted a *solatium* for loss of consortium as it is not permitted under the Roman Dutch Law, the law applicable to the instant case. It was the submission on behalf of the appellants that both the District Court as well as the High Court of Civil Appeals failed to consider the judgment of this court in the case of Prof. Priyani Soysa Vs. Rienzie Arsecularatne 2000 (2) SLR 283, which both courts were bound to follow along with other land mark cases, that have decided this issue. The Learned President Counsel sought for a judgment from this Court declaring that under the aquilian action for recovery of damages, plaintiffs are not entitled to damages for loss of consortium.

At the hearing of this appeal the learned counsel for the plaintiffs cited several judgments from other jurisdictions England, Ireland and Scotland relating to this issue where

Upon close scrutiny of the judgment of the HCCA the question arises whether this Court is required to answer questions of law 1 and 2 referred to above ,on which leave was granted.

As stated earlier the total damages awarded by the District Court to both plaintiffs was Rs.8.0 million. The breakdown of the damages so awarded is as follows: in the case of 32097/MR, the husband was granted 3.00 million as patrimonial damages and Rs.2.00 million for loss of love and affection resulting from the death of his wife: In the case of 35368/MR, the daughter was granted Rs.1.5 million as patrimonial damages and Rs.1.5 million for loss of love and affection, due to the loss of her mother.

By their judgment, however, the learned judges of the High Court Civil Appeals having consolidated the two cases awarded total damages in a sum of Rs.5.0 million in both cases.

The relevant portions of the judgment which is on pages 11, are reproduced below:

“Plaintiff-Respondent is entitled for a sum of Rupees Five million (Rs.50000,000) jointly and severally in both cases bearing Nos. WP/HCCA/Col 282/2007F and WP/HCCA/Col 282/2007/F from Defendant-Appellants together with interest at the rate of 12% per annum from 21.12.2001 till payment in full”.

It must be noted, as stated earlier, that there is no appeal from this judgment of the High Court of Civil Appeals by the plaintiffs. To appreciate the judgment of the learned judges of the High Court it is necessary to consider the issues that were put in contention before that Court.

The main issues raised by the appellant before the High Court of Civil Appeals were two fold.

It was the position of the Defendants that the learned District Judge –

- (a) Erred in law and misdirected herself by holding that the plaintiff suffered damages for loss of affection in as much as under Roman-Dutch Law, damages can be awarded only in respect of actual pecuniary loss suffered by the plaintiffs and loss, capable of being assessed pecuniarily.
- (b) That the learned District Judge erred in law in assessing the quantum of financial loss,

The learned Judges of the High Court of Civil Appeals in the consolidated appeal considered both these issues.

As to the the issue of awarding damages for loss of “comfort and protection” the main argument on behalf of the defendants was that no issue was raised on the purported loss of comfort and protection nor was it claimed in terms of the plaintiff.

Upon a perusal of the plaintiff filed before that District Court, the husband of the deceased had pleaded in paragraph 7 of the plaintiff that he suffered “severe mental pain and shock” due to the death of his wife and his normal life was disrupted and as a result he suffered damages.

In the plaintiff filed by the daughter of the deceased at paragraph 10, she had pleaded that due to the loss of her mother she has lost “*the protection and assistance of her mother*”.

It is correct that no specific issue had been raised in both plaintiffs but an issue had been raised as to whether the plaintiff has suffered damages “as pleaded in the plaintiff”.

The learned Judges of the High Court of Civil Appeals, having considered the submission on behalf of the defendants, at page 10 of the judgment states “*On account of this, even if we disregard the claim of the Plaintiff-Respondent for compensation for loss of consortium of his wife as a result of her death, we cannot ignore that loss of financial support that the plaintiff would have received in the event she had lived beyond the age of her retirement.*” (emphasis added)

Having stated so the learned Judges of the High Court of Civil Appeals had gone on to assess the actual loss caused to the plaintiff(s) and had arrived at the figure

of Rupees five million (Rs.5000,000) jointly and severally in both cases. The High Court of Civil Appeals also had adjusted the rate of interest of 24% fixed by the District Court and had fixed the rate of interest at 12% per annum.

Upon a consideration of the reasoning given by the learned Judges of the High Court of Civil Appeals, the only conclusion that this court can arrive at is that the High Court disregarded the damages awarded for loss of consortium. Presumably the High Court of Civil Appeals held with the Appellants, that the plaintiffs have not specifically claimed damages for loss of consortium. The High court only considered the calculable pecuniary loss caused to the plaintiffs in both cases.

As the High Court of Civil Appeals has not granted damages for loss of consortium, a pronouncement by this Court on issues (1) and (2) of paragraph 16 of the petition, in my view would not be necessary.

With regard to the 3rd issue, on the calculation of damages based on the earnings by the deceased, was not canvassed by the learned President Counsel for the defendants before this court. As such I have not considered the findings of the learned District Judge and the High Court of Civil Appeals on that aspect. As such answering the 3rd issue also does not arise.

Finally as regards the 4th issue on which leave was granted, it was submitted that in terms of Section 192 of the Civil procedure Code what Court can award is legal interest and the imposition of interest at the rate of 12% per centum is contrary to the said provision of the Code of Civil Procedure.

An amendment was brought in 1980, by Act No.53 of 1980 and the rate of interest on money to be decreed, was fixed at 12 per centum per annum in the

absence of an agreement between the parties and the said section, for ease of reference, is reproduced below:

“When the action is for a sum of money due to the plaintiff, the court may, in the decree order interest according to the rate agreed on between the parties by the instrument sued on, or in the absence of any such agreement **at the rate of twelve per centum per annum to be paid on the principal sum** adjudged from the date of the action to the date of the decree...” *(emphasis added)*

An amendment to Section 192 of the Civil Procedure Code however was brought in 1990 by Act No. 6 of 1990 by which Section 192 was repealed and substituted by a new section, and the amended section reads as follows:

“ When the action is for a sum of money due to the plaintiff, the court may, in the decree order interest according to the rate agreed on between the parties by the instrument sued on, **or in the absence of any such agreement at the legal rate, to be paid, on the principal sum** adjudged from the date of action to the date of the decree.....” *(emphasis added)*

The learned counsel for the Plaintiffs conceded this fact and admitted that what the court could have granted was legal interest. In all probability the Judges of High court of Civil Appeals may have overlooked the fact that Section 192 had been subject of an amendment and a new section had been substituted in its place.

Accordingly judgment of the High Court of Civil Appeals is affirmed and I hold that the Plaintiff Respondent is entitled to the sum awarded by the High Court

together with legal interest, instead of interest at the rate of twelve (12) percentum, commencing from 21.12.2001 till the payment is made in full.

Subject to the variation of interest referred to above, both the appeals, i.e SC Appeal 49/2011 and SC Appeal No 50/2011 are dismissed.

The plaintiff Respondent-Respondents in both cases are entitled for the costs of this court as well as the cost of courts below.

JUDGE OF THE SUPREME COURT

Justice Eva Wanasundera P.C

I agree

JUDGE OF THE SUPREME COURT

Justice Sisira J De Abrew

I agree

JUDGE OF THE SUPREME COURT