

**NANDAKEERTHI
v
KARUNAWATHIE**

COURT OF APPEAL
DISSANAYAKE, J. AND
WIJAYARATNE, J.
C.A.1000/95
D.C.MONERAGALA 1524/M
MARCH 11, JULY 30 AND
AUGUST 27, 2003

Action under lex aquilia – Motor car accident – Husband killed – Claim by putative wife – Defendant on deceased. – Is she entitled to compensation?

The plaintiff-respondent sought compensation on the premise that her husband who maintained her and their six children was killed as a result of a road accident, caused by the defendant-appellant driving his vehicle negligently.

The trial court awarded compensation.

On appeal it was contended that the plaintiff-respondent was not the lawful widow and hence she had no nexus as a dependent to sue the defendant-appellant.

Held

- (1) The present action is one under *lex aquilia*, where the right to sue for compensation depends on the fact of the plaintiff-respondent being entitled to seek compensation for the wrong done and not for loss of any inheritance; such right depends on the fact of the plaintiff being a dependant of the deceased where death deprived her of such dependence, and is not a right acquired by reason of inheritance or deprivation of the right to depend as an heir of the deceased.
- (2) The evidence has adequately established the fact that the plaintiff as the putative wife of the deceased and as the mother of the six children, and the death resulting from the accident caused by the defendant-appellant deprived her of the support she got from the deceased for her sustenance.

APPEAL from the judgment of the District Court of Moneragala.

Cases referred to :

1. *Gunaratne v Punchihamy* – 15 NLR 501
2. *Punchi Nona v Charles Appuhamy* – 33 NLR 227

Navin Marapana for defendant-appellant.

N.R.M. Daluwatte, P.C., with *Gayanthi de Silva* for plaintiff-respondent.

Cur.adv.vult.

January 23, 2004

WIJAYARATNE, J.

This is an appeal preferred by the defendant-appellant from the judgment of the District Judge of Moneragala dated 11.08.1995 whereby the learned Trial Judge has awarded the plaintiff compensation in a sum of Rs.150,000/- together with interest thereon and the costs of the suit. 01

The award of compensation was sought by the plaintiff on the premise that her husband who maintained her and their six children was killed as a result of a road accident caused by the defendant negligently driving his vehicle on 08.03.1988. Deceased's death certificate marked P1 was read in evidence. The defendant answering the plaint challenged the plaintiff to prove all facts averred and denied any cause of action accrued to the plaintiff to sue him. He further pleaded that the plaintiff had failed to follow the procedure in filing an action of this nature and prayed that plaint be dismissed with costs. 10

However, at the commencement of the trial the defendant raised several issues outside his pleadings putting in issue whether,

- (a) the plaintiff has the right to claim compensation as a lawful defendant (නිත්‍යනුකූල යැපෙන්නෙක) of the deceased.
- (b) is the cause of action prescribed in law.
- (c) was the death of the deceased caused as a result of the contributory negligence on the part of the deceased.
- (d) was the death caused as a result of negligence of the deceased.

At the trial evidence had been led to the effect that the plaintiff was not legally married to the deceased but lived as husband and wife since 1960 to date of death, producing seven children (page 7 to page 12). The plaintiff in her evidence has answered that she

was not married (විවාහ වෙලානුහැයු;) to the deceased but ever since her cohabitation in 1960 they were living together in harmony, were accepted by the relatives and the rest of the society as husband and wife for all purposes they were husband and wife and their seven children were born through her cohabitation with the deceased.

The learned trial Judge in his judgment answered the 1-6 issues suggested by the plaintiff in the affirmative, answered issue nos. 7 and 11 suggested by the defendant in the affirmative and issues nos. 8,9 & 10 were answered in the negative. The learned District Judge having concluded that the plaintiff and the deceased were married by habit and repute, determined that she had the right to sue for compensation and on a computation of average income of the deceased for the balance period of life expectancy, decided that the plaintiff is entitled to recover the amount of Rs.150,000/- by way of compensation.

The defendant-appellant appealed from the said judgment on the grounds,

- (a) that the learned trial Judge has failed to consider the fact of the defendant being acquitted of the charge of negligence under section 298 of the Penal Code.
- (b) that the plaintiff not being the lawful widow of the deceased had no right to sue for compensation.
- (c) that the learned trial Judge failed to appreciate the deficiencies of plaintiff's case.

At the hearing of the appeal the learned counsel for the defendant-appellant in his argument as well as in his written submissions only relied on the fact that the plaintiff was not the lawful widow and hence she had no nexus as a dependant to sue the defendant. He even argued that there was no marriage by habit and repute as concluded by the learned trial Judge in the light of the plaintiff's own admission that she was not married to the deceased. Even the presumption of a marriage by habit and repute was effectively rebutted by her own testimony that she was not married to the deceased. In support of his argument the learned counsel for appellant relied on the case of *Gunaratne v*

Punchihamy⁽¹⁾, Punchinona v Charles Appuhamy⁽²⁾.

In both these decisions it was held that the admission by the widow that she was not married to the deceased, with whom she cohabited the presumption of marriage from the evidence of cohabitation, habit and repute was rebutted.

Be that as it may, in my view the question of the plaintiffs marriage to the deceased is not material in the determination of the core issue in this case. The facts of the present case are somewhat different to the cases referred to above, because in the first case of *Gunaratne v Punchihamy*, she had her children using her ge name and not that of her husband by habit and repute establishing that her children were not considered legitimate. In the second case of *Punchinona v Charles Appuhamy*, she had her associate husbands and after death of one she claimed marriage to the other by habit and repute. Quite contrary to such facts, the plaintiff in the present case has since her cohabitation with the deceased in 1960, lived as his wife up to the time of his death, all their children were registered as their children, their relatives friends and others in the society accepted and treated them as husband and wife. Her answer that she was not married, in my view is not material in the determination of the question of her marriage whether it constitute putative marriage because she is not competent to determine whether the surrounding circumstances and facts established such a marriage. However, whether the plaintiff had a legally valid marriage to the deceased is totally immaterial in the determination of the issue in the present case under review.

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The present action is one under *lex Acquilia* or commonly known as an acquilition action, where the right to sue for compensation depend on the fact of the plaintiff being entitled to seek compensation for the wrong done and not for loss of any inheritance. Such right depends on the fact of the plaintiff being a dependant of the deceased where death deprived her of such dependence, it is not a right acquired by reason of inheritance or deprivation of the right to depend as an heir of the deceased.

In this regard the following passage from *Lex Acquilia – Book IX – Title 2 page 565* is very relevant. It states,

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"If perchance wife, parents and children join in such a matter, the one is not to be put before the other. Rather should the action be granted to each singly for the damages which he or she proves that he or she sustained. This is firstly because they are each striving not for a penalty, but for the making good of damage caused to them. Secondly it is because this action is granted to wife, children and the like not as heirs of the person killed and thus by right of inheritance, but as persons who have been hurt by the act of the killer. The result is that it falls to be applied even to those who could not be heirs of the deceased in 110 intestacy or who refused to enter upon the inheritance to the person killed as being a suspected inheritance."

In the instant case, the evidence before the trial Judge has adequately established the fact that the plaintiff as the putative wife of the deceased, and as the mother of the seven children of the deceased, was fully dependant on the deceased for her sustenance, and the death resulting from the accident caused by the defendant deprived her of the support she got from the deceased for her sustenance.

The question with regard to the negligence of the defendant as 120 determined by the learned trial Judge was not canvassed by the learned counsel for the appellant. It is trite law that the acquittal of a criminal charge where the standard of proof is beyond reasonable doubt will not affect the civil liability based on negligence determined on a balance of probability.

Even the learned counsel for the appellant did not argue that the plaintiff was not a dependant on the deceased; his argument was that even though she was a dependant, she had no legal nexus to claim compensation from the defendant. This being an acquisitional action where the plaintiff who as a person fully dependant on the 130 deceased for her support, being hurt by the wrongful act of the defendant, the same is maintainable by her against the defendant for the recovery of compensation.

Accordingly, the appeal of the defendant-appellant is dismissed with costs.

DISSANAYAKE, J. - I agree

Appeal dismissed.