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HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

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HIGH COURT OF JUDICATURE AT ALLAHABAD

LUCKNOW

FIRST APPEAL FROM ORDER No. - 386 of 2024

Ashok Kumar And Others

.....Appellant(s)

Versus

Union Of India Thru. General Manager North Eastern Railway, Gorakhpur

.....Respondent(s)

Counsel for Appellant(s)

:

Manish Kumar Srivastava, Chandra Prakash Singh, Saroj Kumari

Counsel for Respondent(s)

:

Vijay Pratap Singh

Court No. - 20

HON'BLE PRASHANT KUMAR, J.

1. Heard Mr. Manish Kumar Srivastava, learned counsel for the appellants as well as Mr. Vijay Pratap Singh, learned counsel for the Union of India and perused the record.

2. The instant appeal has been preferred against the judgment and award dated 26.09.2023 passed by the Railway Claims Tribunal, Lucknow Bench (hereinafter referred to as the 'Tribunal') in Claim Application No.OA/II/U/LKO/202/2018.

3. Brief facts of the case are that on 13.06.2017, one Smt. Savitri Devi along with her two sons was travelling by train Jan Sadharan Express from Sitapur Cantt. to Biswan Railway Station and she was having a second class journey ticket. While de-boarding the train, she accidentally fell down from the train at Biswan Railway Station and sustained injuries and succumbed to the same. At the time of death, she was carrying a female foetus of about 7 months, that also expired along with her. Thereafter, family members of the deceased filed a claim petition before the Tribunal on 25.04.2018. The Tribunal, after hearing the parties and perusing the record came to the conclusion that the deceased unborn child (foetus) was not a bona fide passenger under Section 123(c)(2) read with Section 124-A of the Railway Act, 1989, and accordingly, the Tribunal dismissed the claim petition vide its judgment and award dated 26.09.2023.

4. This order has been assailed by the claimants on the ground that no compensation was granted for the death of the foetus. Submissions of learned counsel for the parties

5. Mr. Manish Kumar Srivastava, learned counsel for the appellants submitted that the postmortem report of the deceased (mother of unborn child) clearly shows that she was carrying a foetus of about 7 months. Therefore, the Tribunal ought to have awarded the compensation not only towards the deceased but also towards the foetus.

6. He has placed reliance upon a judgement passed by the Karnataka High Court in the matter of Divisional Controller, B.T.S. Division, KSRTC, Bangalore v. Vidya Shindhe, reported in 2003 SCC OnLine Kar 447, wherein the accident resulted in grievous injuries to a pregnant woman. The surgery known as 'Foetal distress' was conducted and she gave birth to a child who died after two days of delivery. The claim for compensation on account of the death of the child was filed. The Tribunal awarded a compensation of Rs.1,50,000/- towards death of the child which was challenged before the Karnataka High Court on the ground that the claim was not maintainable, as the child was not born on the date of the accident. The Karnataka High Court held that as per the doctor's advice if the foetus had completed 37 weeks, for all practical purposes the still-born child has to be considered as a child and the claim petition filed by the mother on account of death of her two days old child who was born subsequent to the date of the accident was maintainable.

7. He has further placed reliance upon a judgment passed by the Karnataka High Court in the matter of Bhawaribai Vs. New India Assurance Co. Ltd., reported in 2006 ACJ 2085, wherein the claimant suffered abortion on account of the accident. The Court considered the death of foetus in womb is at par with death of a minor and also came to the finding that in case of abortion and death of foetus in the womb should be considered at par with the case of a death of a minor.

8. Mr. Manish Kumar Srivastava, learned counsel for the appellants further placed reliance upon a judgment passed by the Delhi High Court in the matter of Prakash & Ors. v. Arun Kumar Saini & Anr. (MAC. App. No.602 of 2009), wherein it has been

held as under:

"17. ... The unborn child to whom the live birth never comes is held to be a 'person' who can be the subject of an action for damages for his death. The foetus is another life in woman and loss of foetus is actually a loss of child in the offing. The appellants are, therefore, entitled to compensation for the loss of foetus."

(emphasis supplied)

9. He has further placed reliance upon a judgment passed by Madras High Court in the matter of Branch Office, New India Assurance Co. Ltd. Vs. Krishnaveni, reported in [2009 SCC OnLine Mad 1201], wherein the High Court held that the still-born baby has to be considered as a child.

10. To buttress his argument, he further placed reliance upon a judgment passed by this High Court in the matter of Smt. Kamna Sharma v. Union of India, (First Appeal From Order No.609 of 1982) and Shri Sukhmandan v. Union of India ; (First Appeal From Order No.174 of 2025).

11. He further submitted that an unborn child aged five months onwards in the mother's womb till its birth can be treated as a child in existence. The unborn child to whom the live birth never comes can be held to be a 'person' who can be the subject of an action for damages for his death.

12. Per contra, Shri Vijay Pratap Singh, learned counsel for the Union of India vociferously opposed the instant appeal and to buttress the same he has placed reliance upon Section 125 of the Railways Act, 1989, which reads as under: -

"125. Application for compensation:

(1) An application for compensation under section 124 or section 124A may be made to the Claims Tribunal- (a) by the person who has sustained the injury or suffered any loss, or (b) by any agent duly authorised by such person in this behalf, or (c) where such person is a minor, by his guardian, or (d) where death has resulted from the accident or the untoward incident, by any dependant of the deceased or where such a dependant is a minor, by his guardian.

(2) Every application by a dependant for compensation under this section shall be for the benefit of every other dependant."

13. He further submitted that no application for compensation can be entertained for anybody apart from mentioned in the aforesaid section. Since unborn child is not included in the Section, hence no compensation would be awarded to him. To buttress his arguments, he has placed reliance upon judgement dated 02.05.2008 passed by the Bombay High Court in the matter of Margappa Shethappa Vadar v. Proctor and Gamble India, Mumbai and Another ; (F.A. No.661 of 2004) on the basis of which the Tribunal has rightly rejected the claim of the unborn child.

14. No other argument has been raised by learned counsels for parties.

Analysis

15. Heard learned counsel for the parties and perused the record.

16. The sole point of determination raised in the present appeal for adjudication is as to whether the death of unborn child (foetus) would fall under the ambit of Section 123(c)(2) read with Section 124-A of the Railway Act, 1989.

17. To decide this point of determination, it is pertinent to discuss different stages of birth of a child in the womb of a mother. Technically the term developing zygote is used for the first seven to ten days after conception i.e. until implantation occurs. It is called an 'embryo' from week one to the end of the second month and later it is called 'foetus'. It becomes an infant only when it is completely born. Life may enter immediately on the date of conception in the form of a small cell, which gets multiplied, but physically a mother can feel the movement of child only when the foetus is twenty weeks old i.e., five months, as the cell changes its structures and texture to become an eye, legs, bones, blood, head etc. and only when the child makes movements touching the internal walls of the womb, then the actual life does take its physical form, therefore, there may be controversy as regards the exact date of life entering the foetus but there cannot be any controversy as regards the life of an unborn child after seven months of pregnancy, as in many instances premature delivery takes place during the seventh month of pregnancy and the child still survives.

18. The legal status of unborn persons is discussed in Salmond on Jurisprudence, 11th Edition, at pages 354 and 355, the relevant portion of which reads as follows:

"A child in its mother's womb is for many purposes regarded by a legal fiction as already born, in accordance with the maxim, *Nasciturus pro jam nato habetur*. In the words of Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth". Thus, in the law of property, there is a fiction that a child *en ventre sa mere* is a person in being for the purposes of (1) the acquisition of property by the child itself, or (2) being a life chosen to form part of the period in the rule against perpetuities."

(emphasis added)

19. The maxim '*en ventre sa mere*' means 'in the mother's womb', though it is a French phrase, but was widely used. In the English laws way back in the 19th century in re ; *Occleston v. Fullalove* (1873?74) L.R. 9 Ch. App. 147 this issue was considered by the Court of Chancery while implementing this principle for the law of wills and succession. The same Court later in re ; *Wilmer's Trusts*, *Moore v. Wingfield*; [1903] 2 Ch. 411 had also recognized the right of unborn child. This concept has been extended beyond the law of wills and succession and the geographical boundaries of United Kingdom. In Australia in re: *Watt v. Rama* [1972] VR 353, the Supreme Court of Victoria held that the foetus is a person and once born is entitled for the compensation. U.S. Court even a step further ahead and removed the requirement of the foetus to actually be born. In re: *Amadio v. Levin*, 501 A.2d 1085, 1088-89 (Pa. 1985) the Supreme Court of Pennsylvania held that it makes no difference in liability under wrongful death and survival status where the child dies prior to or after death.

20. Hon'ble Supreme Court in the matter of *S. Said-ud-Din v. Commissioner Bhopal Das Victims*, reported in (1997) 11 SCC 460, awarded compensation to a child, who was adversely affected due to the gas leakage, which was inhaled by her mother when the child was in the womb. The doctor who examined the child on the sixth day of its birth found symptoms including eruption of body and smarting of the eye as well as breathlessness. Therefore, the Supreme Court held that as the infant too was the victim of the MIC poison, she was entitled to compensation. Various Human Rights Commissions also held that the stillborn child is entitled to compensation on account of the injuries caused or death occurred due to violation of human rights.

Even the Transfer of Property Act recognized the rights of the stillborn child and several provisions of the Indian Penal Code, 1980, also provide for punishment by reason of hurt or birth or abortion with regard to the stillborn child.

21. The Karnataka High Court in the matter of Vidya Shindhe (supra) wherein the accident resulted in grievous injuries to a pregnant woman. The surgery known as 'Foetal distress' was conducted and she gave birth to a child who died after two days of delivery. The claim for compensation on account of the death of the child was filed. The learned Tribunal awarded Rs.1,50,000/- towards death of the child which was challenged before the Karnataka High Court on the ground that the claim was not maintainable, as the child was not born on the date of the accident. The Karnataka High Court held that as per the doctor's advice if the foetus had completed 37 weeks, for all practical purposes even the still-born child has to be considered as child and the claim petition filed by the mother on account of death of her two days old child who was born subsequent to the date of the accident was maintainable. The award of Rs.1,50,000/- by the learned Tribunal was upheld. The findings of the Karnataka High Court in the above case are as under:-

"5. ??????...As per the doctor's evidence, if the foetus has completed 37 weeks, for all purpose even the still born child has to be considered as child. In the instant case, in the accident the child has also received injuries which has compelled the mother to undergo a surgery. The baby died due to the injuries received by him in the accident while in the womb. Though there is no direct impact between the vehicle and the baby, since the baby had received injuries while in the womb, this Court has to hold that there is a nexus between the accident and the cause of death of the child. In the circumstances, this Court is of the opinion that the claim petition filed by the mother on account of the death of her two days baby who has born subsequent to the accident as maintainable.

(emphasis added)

22. The Madhya Pradesh High Court in the matter of Shraddha v. Badresh, reported in 2005 SCC OnLine MP 574 : 2006 ACJ 2067, wherein the accident resulted in injury to a pregnant women carrying seven months old foetus. Due to accident, the claimant delivered a dead male baby by operation. The Tribunal awarded Rs.70,000/- towards the medical expenses and Rs.80,000/- towards the non- pecuniary compensation. The appeal was filed for enhancement of the compensation, wherein the compensation was enhanced from Rs.1,50,000/- to Rs.2,50,000/- . The Court held that a still-born baby has to be considered as child. The findings of the Court are as under:-

" 7. It is not in dispute that claimant was pregnant and the child was in the womb of the mother at the time of accident. It is also not in dispute that the mother who is appellant herein has sustained grievous injuries and on account of which she was hospitalized. It is also not in dispute that if claimant had not suffered injuries, child in her womb would not have been affected. She had to undergo a surgery and delivered a dead male baby. For the purpose of considering the case for awarding compensation even the stillborn baby has to be considered as child.

8. Stillborn baby died in the womb due to the injuries sustained by the appellant in the accident. In the opinion of this court there is a nexus between the accident and the cause of death of the child. Appellant is entitled for compensation on account of death of or stillborn male baby. It was first delivery of the appellant. Since, no separate amount has been awarded on that account, therefore, this appeal stands allowed. Appellant shall be further entitled for a sum of Rs. 1,00,000 on account of death of stillborn male child. Total sum for which appellant shall be entitled comes to Rs. 2,50,000. The enhanced amount of Rs. 1,00,000 shall carry interest at the rate of 6 per cent per annum from the date of application."

(emphasis added)

23. Further the Karnataka High Court in the matter of Bhawaribai (supra) has held as under:

"In the case of abortion and death of foetus in the womb should be considered on par with the case of a death of a minor."

(emphasis added)

24. The Andhra Pradesh High Court in the matter Oriental Insurance Co. Ltd., Gandhinagar Branch, Bangalore Vs. Santhilal Patal, reported in [2007 SCC OnLine AP 199], wherein the accident resulted in the death of a women and her foetus. The Andhra Pradesh High Court held that an unborn child aged five months onwards in the mother's womb till its birth can be treated as a child in existence. The unborn child to whom the live birth never comes can be held to be a 'person' who can be the subject of an action for damages for his death. The findings of the Court are as under:-

"5.Under Section 166 of the Act a person who has sustained injury or the legal heirs of the deceased person are entitled for compensation arising out of the accident involving death or bodily injuries. Therefore, if the child comes within the definition of person, I am of the opinion that the legal heirs of the child are entitled for compensation. Under Section 8 of the Indian Penal Code, 1860 a gender means the pronoun "he" and its derivatives are used of any person, whether male or female. The meaning of a person as per Oxford Dictionary is 'a human being regarded as an individual and an individual's body :concealed on his person'.

6. No doubt, the Karnataka High Court in Divisional Controller, Karnataka State Road Transport Corporation v. Vidya Shindhe 2005 ACJ 069 : 2003 ILR (Kar) 04269, held that the stillborn child has to be considered as a child. The Madhya Pradesh High Court in Shraddha v. Headrest's II (2006) ACC 304, following the aforesaid judgment of the Karnataka High Court held that the stillborn child died in the accident due to the injuries sustained by its mother in the accident is also entitled to compensation, as there is nexus between the accident and the cause of death of the child and awarded a compensation of Rs. 1,00,000/- for the death of the stillborn child. In the said case the appellant was having pregnancy of 28 weeks whereas in the instant case the child in the womb was counting his days for delivery as he was aged about 10 months i.e. 40 weeks...

7. To decide whether a child in the womb of the mother can be called as a person, it is pertinent to discuss different stages of birth of a child in the womb of a mother. Technically the term developing ovum is used for the first seven to ten days after conception i.e. until implantation occurs. It is called an 'embryo' from one week to the end of the second month and later it is called 'foetus'. It becomes an infant only when it is completely born. The life may enter immediately on the date of conception in the form of a small cell, which gets multiplied, but physically a mother can feel the movement of child only when the foetus is twenty weeks old i.e., five months, as the cell changes its structures and texture to become an eye, legs, bones, blood, head etc. and only when the child makes movements touching the internal walls of the womb, then the actual life does take its

physical form, therefore, there may be controversy as regards the exact date of life entering the foetus but there cannot be any controversy as regards the life of the unborn child if a woman is carrying seven months pregnancy, as in many instances premature delivery takes place during the seventh month of pregnancy and the child still survives.

8. An unborn child aged five months onwards in the mother's womb till its birth can be treated as equal to a child in existence. The unborn child to whom the live birth never comes can be held to be a 'person' who can be the subject of an action for damages for his death. As already stated above a person means a human being regarded as an individual and an individual's body : concealed on his person'. Therefore, human foetus to whom personhood could be attributed was also destroyed in the accident in the instant case; had the accident not occurred the unborn child would have survived and seen the light of the day...."

(emphasis added)

25. The Kerala High Court in the matter of T.R. Manikuttan v. M.N. Baby, reported in 2008 SCC OnLine Ker 223, wherein the accident resulted in the death of a pregnant woman carrying a four month old foetus. Compensation for loss of foetus was claimed. The court further held that foetus is another life in the woman and it comes as a baby in the course of time. Loss of foetus upon death of a pregnant woman is actually loss of a child in the offing for the husband of the woman. The Court held that compensation to be granted for the death of a pregnant woman is for loss of two lives. The findings of the Court are as under:-

"5. ????.In the first place, foetus is another life in the woman and it comes as a baby in the course of time. Though foetus grows in the body of the woman, it cannot be equated to or considered to be a part of the body of the woman. In effect, loss of the foetus consequent upon the death of the pregnant woman is actually loss of a child in the offing for the husband of the woman. Secondly, there is no scope for considering compensation for the bodily injury of the victim who died in the road accident. Therefore, it would be illogical to grant compensation treating death of the foetus along with the woman dying in the accident treating it as another bodily injury. In our view, compensation to be granted for the death of a pregnant woman in motor accident is for loss of two lives. Therefore, appellant in this case is certainly entitled to claim compensation separately for the loss of his child in the womb of his wife who perished in the accident."

(emphasis added)

26. The Madras High Court in the matter of Krishnaveni (supra), wherein the accident resulted in death of a pregnant woman with a nine month pregnancy. The Madras High Court following the judgments rendered by Karnataka High Court and Madhya Pradesh High Court held that the still-born baby has to be considered as a child and compensation of Rs.2,00,000/- was awarded for loss of child in mother's womb. It was held as under:

"9. This Court is in respectful agreement with the concluding in the above said two decisions of the High Courts and holding that the stillborn baby is also to be considered as a child. This Court also records finding that since the child died in the womb due to the accident, the mental agony and physical strain and pain experienced by the mother should have been more and that has to be compensated in an appropriate manner. In the considered opinion of this Court a sum of Rs. 2,00,000/- may be fixed under the head loss of child in the mother's womb."

(emphasis added)

27. This Court is in agreement with the judgments of Karnataka High Court, Madhya Pradesh High Court, Andhra Pradesh High Court cited above, wherein, the courts have taken a view that the death of foetus should be considered as equal to the death of the child for the purpose of computation of compensation.

28. This Court earlier in the matter of Smt. Kamna Sharma (supra), has held as under:

"5. However, in the ultimate award no compensation has been paid for the loss of unborn child and the injuries, pain and sufferance of claimant on account of death of unborn child. From the entire award it is evident that the Claims Commissioner has failed to make any award towards death of unborn child. It is not in dispute that if an unborn child has suffered fatal injury in a railway accident, the parents/mother can claim compensation in respect thereof and in this regard I am fortified by the Apex Court's decision in Rathi Menon Vs. Union of India, AIR 2001 SC 133. In the present case though a finding has been recorded by Claims Commissioner that claimant sustained serious injuries and also suffered loss of unborn child but on that account no compensation has been awarded at all.

6. Though appellant has claimed compensation of Rs. 4 lacs in the present appeal but it is not in dispute that in Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, the compensation payable on account of loss of unborn child is Rs. 2 lacs, which has come into force in 1989/1990. Taking clue therefrom and looking to the entire facts and circumstances of the case, in my view, a compensation of Rs. 50,000/- would be justifiable."

(emphasis added)

29. In view of the above, an unborn child aged five months onwards in the mother's womb till its birth can be treated as equal to a child in existence. The unborn child, who dies in the womb, can be held to be a 'person' who can be the subject of an action for damages for his death. As already stated in the matter of Santhilal Patel (supra) a person means 'a human being regarded as an individual and an individual's body : concealed on his person'. Therefore, human foetus to whom personhood could be attributed was also destroyed in the accident of the instant case; had the accident not occurred, the unborn child would have survived and seen the light of the day.

30. In view of the aforesaid, this court concludes that the rights of the child in the mother's womb are well protected by laws of the land as the foetus is another life in the pregnant woman and loss of foetus is actually a loss of child. Thus, this court has no hesitation in holding that an unborn child aged more than five months onwards in the mother's womb till its birth is treated as equal to a child in existence. The unborn child to whom the live birth never comes is held to be a 'person' who can be the subject of an action for damages for his death. The appellants are, therefore, entitled to compensation for the loss of foetus independently treating the foetus as a child.

31. Though the word "foetus" is not specifically mentioned under the Railways Act, 1989, however the present case would fall within the ambit of Section 124A of the Railways Act, as the death occurred as a result of an untoward incident arising out of a

railway accident, thereby attracting the statutory liability of the Railways to pay compensation to the claimants in case of death.

Conclusion

32. It is evident, on bare perusal of the impugned order that no compensation has been awarded for the loss of foetus, which was 7 months old. Through the above analysis and treating loss of foetus as a loss of child, the foetus would be treated independently as a child. Under the Motor Vehicle Act, 1988, wherein a compensation of child is assessed separately as compared to the grown up person. The schedule under the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, which was substituted and amended in 2016 and came into force on 01.01.2017 clearly shows that in case of death, the amount of compensation for loss of an individual would be Rs.8,00,000/-. Since the foetus is treated as a child, hence death of a foetus/child would be treated as an independent accident apart from the death of the mother. Thus, the claimants are also entitled to get the additional compensation of Rs.8,00,000 for the loss of unborn child.

33. In view of the aforesaid, the impugned judgment and award dated 26.09.2023 passed by the Railway Claims Tribunal, Lucknow Bench in Claim Application No. OA/II/U/LKO/202/2018, is set aside. A compensation of Rs.8,00,000/- be awarded towards the death of unborn child (foetus), which was caused during the course of the accident as per schedule under the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, which was substituted and amended in 2016 and came into force on 01.01.2017.

34. The instant appeal is allowed.

35. The lower court records and a copy of this judgment shall be sent to learned Tribunal for compliance.

(Prashant Kumar,J.)

September 23, 2026

Saurabh Yadav/-

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