(2007) 03 MP CK 0056

In the Madhya Pradesh High Court

Abdul Hafiz and Another APPELLANT

Vs

Babloo and Another RESPONDENT

Date of Decision : 28-03-2007

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 173(1)

Citation : (2009) ACJ 1057

Hon'ble Judges : K.K. Lahoti, J

Bench : Single Bench

Final Decision : Allowed

Judgement

K.K. Lahoti, J.—This is a claimant''s appeal for enhancement of compensation, arising out of an award dated 23.3.2006 by the Motor Accidents Claims Tribunal, Neemuch in M.A.C.C. No. 22 of 2005 by which the Claims Tribunal has awarded Rs. 82,000 along with interest at the rate of 9 per cent per annum from the date of application dated 19.4.2005 till payment and costs. It is also directed that both the appellants shall be entitled to receive the compensation in equal share.

2. Learned Counsel for the appellants submitted that the deceased Abdul Salam was 18 years old unmarried son of the appellant and was carrying on business of sale of bamboos, ballis and tiles, etc. He was also helping his father at the shop, namely, Azad Timber Merchant. At the time of his death his income was Rs. 400 per day. The Tribunal has not properly assessed the compensation, by computing monthly income of the deceased at a lower side. Apart from this the multiplier applied by the Tribunal is incorrect. The appellants are entitled for the multiplier of 16. It is submitted that the compensation awarded be enhanced suitably.

3. Learned Counsel for the respondent No. 1 opposed the contention of the appellants and submitted that the Tribunal has awarded compensation on higher side. The respondent No. 1 has been wrongly held liable for the payment of compensation, so the award passed by the Tribunal be set aside against respondent No. 1.

4. Learned Counsel for respondent No. 2 submitted that the Tribunal erred in not impleading Gopal Auto Parts, Neemuch and Kailash Chandra who were necessary parties in the case. As per the case of the respondent, the vehicle was owned by respondent Ramesh Chandra. His son Rahul, appeared as NAW 2 has specifically stated that vehicle belongs to his father Ramesh Chandra. He on finding some technical fault in motor cycle handed it over to Kailash Chandra who was mechanic at Gopal Auto Parts. Thereafter Kailash Chandra handed over the vehicle to Babloo, respondent No. 1, who caused the accident. So, Gopal Auto Parts and Kailash Chandra were necessary parties to the proceedings and the court below erred in not impleading them in the claim case. In this regard the defendant No. 2 took the specific pleas in para 8 and special pleas. Though the respondent No. 2 has not filed any cross-objection or appeal against the impugned award, but this Court by exercising powers under Order 41, Rule 33 of CPC direct that impugned award be set aside and matter may be remitted back to the Tribunal with the direction to implead Gopal Auto Parts and Kailash Chandra as respondents. The Tribunal be directed to decide the matter afresh after impleading the aforesaid parties. Reliance is placed to the Supreme Court judgments in Pannalal Vs. State Bombay and Others, ; Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhatt 1966 ACJ 89 (SC); a Full Bench judgment of this Court in Prakramchand Vs. Chuttan and Others, ; a Division Bench judgment of this Court in Ram Singh and Others Vs. Ashok Sharma and Others, and submitted that this Court should exercise powers under Order 41, Rule 33, CPC to do justice in the case. The respondent No. 2 has not preferred an appeal or cross-objection because for filing an appeal or cross-objection the respondent No. 2 is required to deposit the statutory amount as envisaged u/s 173(1) of the Motor Vehicles Act, 1988 (hereinafter referred as ''the Act'') which is not required, if powers under Order 41, Rule 33 are exercised. Apart from this the respondent No. 2 being in service is not having money to deposit the statutory amount to file an appeal or cross-objection and has invoked the jurisdiction of court under Order 41, Rule 33, Civil Procedure Code.

5. Learned Counsel for the appellants opposed this contention and submitted that without challenging the findings of the Tribunal by filing cross-objection or appeal, such objections cannot be entertained. Reliance is placed on a Division Bench judgment of this Court in Anil Tiwari and Others Vs. Saheb Singh and Others, and single Bench judgment of Allahabad High Court in U.P. State Road Trans. Corporation v. Mohd. Firoz 2007 (1) TAC 601. So far as exercise of power under Order 41, Rule 33, CPC is concerned, it is submitted that respondent No. 2 ought to have filed cross-objection for assailing the judgment of the Tribunal. It hardly matters that the aforesaid appeal or cross-objection requires compliance of Section 173(1) of the Act, which is a statutory mandate. In absence of filing the cross-objection, the contention of the respondent No. 2 cannot be accepted. Reliance is placed to Apex Court judgment in Banarsi Das v. Ram Phal 2003 AIR SCW 1494.

6. Before considering the contentions of the parties, it would be appropriate if

the contention of respondent No. 2 may be seen, that this Court should exercise powers under Order 41, Rule 33, CPC to direct the respondents to implead Gopal Auto Parts and Kailash Chandra as parties and for this purpose to remand the case to the Tribunal.

7. In Banarsi Das'' case 2003 AIR SCW 1494, the Supreme Court considered the appellate powers for modification of decree appealed against, in the absence of cross-objection by plaintiff-respondent. The Apex Court held that there are limitations to exercise such powers. The suit was for specific performance of contract. The plaintiff in the suit also claimed refund of earnest money in addition to relief of specific performance. The trial court denied specific performance but granted relief of refund of earnest money with a condition that if defendant failed to deposit the money, sale deed will be executed. Against the aforesaid judgment and decree the defendant preferred an appeal but the plaintiff had not preferred cross-objection. First appellate court dismissed the appeal with modification that the suit of plaintiff is decreed for specific performance. The Supreme Court held that modification of decree was without jurisdiction.

8. The Apex Court in Pannalal Vs. State Bombay and Others, , while considering the power of appellate court under Order 41, Rule 33, Civil Procedure Code, held that the appellate court can give relief to a respondent as against other respondents and filing of cross-objections by respondents is not always necessary. Order 41, Rule 22, CPC permits as a general rule, to a respondent to prefer an objection only against the appellant and it is only in exceptional cases the powers under Order 41, Rule 33 be exercised.

9. Full Bench of this Court in the case of Prakramchand Vs. Chuttan and Others, , has considered that the appellate court is having power under Order 41, Rule 33 to prevent justice being defeated. In absence of appeal or cross-objection by respondents if there is some legislative mandate which has been ignored, the appellate court may exercise powers under Order 41, Rule 33. In the aforesaid case the question of payment of interest was before the Full Bench who after considering the question held that in absence of cross-objection the appellate court is having power to enhance the interest on the awarded amount.

10. The Division Bench in Rajesh v. Rukmani 2000 (1) JLJ 134, considering the matrimonial case found that issue of desertion was decided against the respondent, though not challenged by filing cross-appeal, the appellate court still can decide the same under discretionary powers under Order 41, Rule 33 of Civil Procedure Code.

11. Now in the light of aforesaid judgments factual position in the present case may be seen. Respondent No. 2 has not preferred any appeal or cross-objection in the case. Prior to 1988 the position was different and filing of the appeal or cross-objection was permissible without deposit of any statutory amount, but now after enactment of Section 173(1) of the Act, the legislation has provided that No. appeal by the person who is required to pay any amount in terms of

such award shall be entertained by the High Court, unless he has deposited with it Rs. 25,000 or 50 per cent of the amount so awarded, whichever is less, in the manner directed by the High Court. The aforesaid provision is also applicable in respect of filing of the cross-objection by the respondent. In this case the appeal was admitted and thereafter on the date of hearing it was very specifically asked from the respondents whether they are intending to prefer any cross-objection or appeal in the matter, but they have made a specific statement that No. such cross-objection or appeal they want to prefer and the matter was heard finally. Meaning thereby, respondents were not intending to file any cross-objection. As stated during the course of the argument by respondent No. 2 that filing of the cross-objection requires deposit of the statutory amount and the respondent No. 2 is not intending to deposit the amount and because of this the cross-objection was not filed. When the intention of legislation is clear and there is requirement of the law to deposit the statutory amount as envisaged in Section 173 of the Act, the respondent cannot avoid the statutory obligation and take shelter of Order 41, Rule 33 of CPC to raise his contention for which he was otherwise entitled to raise under Order 41, Rule 22 of Civil Procedure Code, merely on the ground that filing of the cross-objection would require deposit of the statutory amount. Though to do justice in the matter appellate court is having power to exercise jurisdiction under Order 41, Rule 33 of the Civil Procedure Code, but to circumvent provisions of Section 173(1) of the Act, such powers cannot be invoked by respondent No. 2.

12. In view of the aforesaid, I do not find that this is a fit case to invoke powers of this Court under Order 41, Rule 33, Civil Procedure Code, merely on the ground that on filing of the cross-objection under Order 41, Rule 22, Civil Procedure Code, respondent No. 2 would have to deposit the statutory amount and to facilitate the respondent No. 2 to avoid that liability this Court should exercise power under Order 41, Rule 33, Civil Procedure Code. The power under Order 41, Rule 33 is to be used with caution and sparingly. As a matter of course, the aforesaid jurisdiction cannot be exercised. The power is to be used with limitation that it should not be exercised to the prejudice or disadvantage of a person not a party before the court, or a claim given up or lost cannot be revived or such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve finality cannot be reversed to the advantage of such party. [See Banarsi Das v. Ram Phal 2003 AIR SCW 1494.

13. In the present case, the factual position is similar. The respondent No. 2 who was having an opportunity to file cross-objection to assail the aforesaid finding had not availed that opportunity. In this case, Tribunal has imposed liability on respondents as a driver and owner of the vehicle, respectively. If the respondent No. 2 was of the opinion that he is not liable or the entire liability has been wrongly imposed on him by the Tribunal, then he ought to have preferred an appeal or cross-objection against the award but failing which, the respondent No. 2 cannot be permitted to say that in place of cross-objection he may be

permitted to agitate his contention under Rule 33 of Order 41, Civil Procedure Code.

14. There is one more aspect which cannot be ignored. The case of respondent No. 2 is that his son handed over the vehicle to Kailash Chandra, the mechanic of Gopal Auto Parts, who subsequently had handed over the vehicle to respondent No. 1 who happens to be the son of Kailash Chandra, so the aforesaid liability be imposed on Gopal Auto Parts and/or on Kailash Chandra. This was, inter se, contract or arrangement between respondent No. 2 and Gopal Auto Parts or Kailash Chandra. There is No. statutory provision in this regard to implead such persons. Under the law claimant has to implead owner of the vehicle and the authorised insurer as necessary party in the case as required u/s 163-A(1) of the Act, as the application was filed only u/s 163-A of the Act. The aforesaid provision specifically provides that the owner of the vehicle or the authorised insurer shall be liable to pay the compensation and if there is some other person with some arrangement with owner then it is not obligatory or mandatory on the part of the claimant to make such an application against the aforesaid person. Necessary party for deciding the application u/s 163-A are the owner and insurer of the vehicle. In these circumstances if the claimant has not impleaded Gopal Auto Parts and Kailash Chandra, No. fault is found. Respondent No. 2, to avoid his liability, cannot compel the claimant to implead Gopal Auto Parts and Kailash Chandra in the case. If there is some arrangement or agreement between respondent No. 2 and Gopal Auto Parts or Kailash Chandra then the respondent No. 2 shall be free to take recourse against them in accordance with law, but on this ground it is not necessary for this Court to remit this case to the Tribunal for their impleadment or for a fresh decision.

In these circumstances, the contention of respondent No. 2 that the matter may be remitted back for the impleadment of Gopal Auto Parts and Kailash Chandra has No. force and is accordingly turned down.

15. Now the compensation awarded by the Tribunal may be seen. In this case the Claims Tribunal found that the deceased Abdul Salam was 18 years old but about his income there is No. proof. The Claims Tribunal found notional income at the rate of Rs. 1,500 per month and dependency of the parents was found Rs. 600 per month. Annual dependency was found Rs. 7,200 and applying multiplier of 10, the compensation of Rs. 72,000 has been assessed. Further an amount Rs. 5,000 for shock and suffering and Rs. 5,000 towards funeral expenses, thus total Rs. 82,000 has been awarded. u/s 163-A, the Second Schedule provides compensation for third party fatal accidents claims. The deceased was 18 years old and considering total facts of the case his income can be assessed at Rs. 1,750 per month or Rs. 21,000 per annum. Deducting 3rd amount for personal expenses, dependency of appellants may be assessed at Rs. 14,000 per annum. As the deceased was unmarried, so the age of mother 38 years may be taken into consideration for the purposes of application of multiplier under the Schedule as held by the Division Bench of this Court in United India Insurance Co. Ltd. Vs.

Asha Devi and Others, . The multiplier which may be applied in this case will be 16. On the basis of this, the compensation comes to Rs. 2,24,000. Apart from this, the appellants shall be entitled for Rs. 2,000 as funeral expenses and Rs. 2,500 for loss to estate. The total compensation comes to Rs. 2,28,500. [See Manju Devi v. Musafir Paswan 2005 ACJ 99 (SC), by the Supreme Court]. On the enhanced amount the appellants shall be entitled to get interest at the rate of 7.5 per cent per annum as has been held recently by the Apex Court in New India Assurance Co. Ltd. Vs. Satender and Others, .

16. Accordingly this appeal is allowed. The award passed by Tribunal is modified in following terms:

(1) The appellants shall be entitled for the total compensation of Rs. 2,28,500 (rupees two lakh twenty-eight thousand five hundred) from the respondents, jointly and severally.

(2) On the enhanced amount the appellants shall be entitled for the interest at the rate of 7.5 per cent per annum from the date of application till its payment.

(3) So far as compensation and interest awarded by the Tribunal is concerned, it shall remain unaffected.

(4) The enhanced amount with interest, on deposit, shall be invested in a nationalised bank for a minimum period of 5 years, in a beneficial scheme.

(5) The appellants shall be entitled for the cost of litigation and counsel''s fee Rs. 2,000 (rupees two thousand).

