(2011) 03 KAR CK 0366

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 4587 of 2007

B. Sadashiva Reddy and Another — APPELLANT

Vs

United India Insurance Co. Ltd. and Another — RESPONDENT

Date of Decision : 29-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 166

Citation : (2011) 3 KCCR 2359

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : Shripad V. Shastry, for the Appellant; T. Mohan Kumar for Respondent-1, for the Respondent

Final Decision : Allowed

Judgement

Aravind Kumar, J.—Claimants are in appeal questioning the correctness and legality of the judgment and award dated 30-8-2006 passed by the I Addl. Judge and Motor Accident Claims Tribunal, Bangalore, in MVC No. 1535/2003 and seeking enhancement of compensation not being satisfied with the compensation awarded by the Tribunal.

2. The Appellants filed a claim petition u/s 166 of Motor Vehicles Act seeking compensation of Rs. 20,00,000/- with interest at 12% p.a. on account of the death of Smt. Manjula (first appellant''s wife and second appellant''s mother in a road traffic accident that occurred on 25-1-2003 at about 6-45 p.m. It was contended that deceased Smt. Manjula had stopped her two wheeler (Scooty) bearing No. KA-04-U-5060 at a Yeshwanthpur traffic signal and at that point of time, a BEL bus bearing registration No. KA-04-3110 driven in a rash and negligent manner from East to West dashed against the said two wheeler and deceased was dragged below the wheels of the said bus, on account of which she succumbed to the injuries at the spot. Hence, on account of her death, her husband and son filed a claim petition seeking compensation contending that she

was working as a Lecturer-cum-Artist at Ken School of Arts at Seshadripuram and was drawing a salary of Rs. 15,000/- p.m. On account of her death, they have been put to financial loss, as such they sought for payment of compensation.

On petition being registered and notice being issued to the respondents, first respondent-Insurer appeared and filed written statement in detail by denying petition averments. However, issuance of policy to the offending vehicle was admitted. It was contended that there was contributory negligence on the part of the deceased in riding the scooty and attributed the same to her to an extent of 90%.

On the basis of the pleading of the parties, tribunal framed issues for its consideration. Petitioner No. 1 got himself examined as PW-1 and also examined two witnesses, namely, the Principal of the school where deceased was working and also an eye witness to the accident, namely, Police Constable of Yeshwanthpur Traffic Sub-Zone. Respondent No. 1 did not lead any oral evidence nor any documents were got marked. On the basis of the pleadings and evidence tendered by the parties, tribunal allowed the claim petition in part and awarded a compensation of? 10,34,816/-with interest at 6% p.a. from the date of petition till date of realization under following heads:

a)

Loss of dependency

Rs. 9,72,816

b)

Funeral expenses

10,000

c)

Loss of consortium

15,000

d)

Loss of love and affection

15,000

e)

Transportation

2,000

f)

Loss of expectancy

20,000

Total

10,34,816

Aggrieved by this judgment and award, claimants are in appeal seeking enhancement of the compensation.

3. Heard Sri Shripad V.Shastry, learned Counsel for the appellants and Sri. T. Mohan Kumar, learned Counsel for first respondent. Notice to 2nd respondent has been dispensed with by this Court by order dated 15.10.2008.

4. It is the contention of Mr. Shastry that tribunal erred in construing the income of the deceased at Rs. 9,354/- and deducting 1/3rd thereunder on the ground that as per the salary certificate which was produced at Roll Book at Ex. P-21 depicted the monthly income of the deceased was Rs. 10,720/-and deducting Rs. 100/- towards Professional Tax, the income of the deceased ought to have been taken as Rs. 10,620/- and thereafter deduction of 1/3rd should have been made to arrive at income of Rs. . 6,550/- and accordingly compensation had to be awarded to the claimants. He also contends that multiplier adopted by the tribunal is on the lower side, namely, 13 and it should have adopted multiplier of 14 taking into consideration the age of the deceased as reflected in the post mortem report Ex P-5. He would also contend that deceased was working as LIC agent and receiving income by way of commission from the said profession and this aspect has not been taken into consideration while arriving at the income of the deceased. He would also contend that deceased was getting regular income since she was an Artist and as such tribunal committed serious error in taking only the salary income. He would draw attention of the Court to the evidence tendered by the claimants to demonstrate that deceased had been appointed as a Member of Lalit Kala Academy which would go to show about the talent that deceased possessed. These aspects have not been taken into consideration for arriving at the correct income of the deceased which, according to him, has resulted in abysmally low compensation being awarded by the tribunal. As such, on these grounds he would seek for enhancement of compensation in this appeal.

5. Per contra, Mr. Mohan Kumar, learned Counsel for first respondent, at the outset, fairly stated that judgment and award passed by the tribunal has been satisfied and amount awarded by tribunal has been deposited before the jurisdictional Tribunal. He would contend that there is no loss of income to the claimants in as much as the husband of the deceased is working as an Auditor and is having regular and substantial income. In this regard, he requests the Court to scrutinize the evidence of PW-1 which has been adduced before the tribunal. He would also contend that there is no material placed on record to show what was the actual income that deceased was earning as an Artist and in the absence thereof, tribunal was correct in taking into consideration the salary

income alone for determining the just and reasonable compensation. He should also contend that in so far as the income generated through commission received by the deceased from LIC would not get reduced nor it would got extinguished by virtue of her death as the commission income would continue to be paid to the L.Rs of the deceased Smt. Manjula who was an LIC agent. He would also contend that there is no loss of income to the claimants and the loss, if at all if any is only to the extent of loss of estate, i.e., the savings that deceased would have made which would accrue to the benefit of family and as such he requests this Court to re-assess the compensation payable d'' hors non-filing of cross-objection or cross appeal. As such, he requests this Court to re-determine the compensation and award the same.

6. Having heard the learned Advocates for the parties, the following points arise for my consideration:

i) Whether the respondent-insurer is entitled to seek for reassessment of the compensation?

ii) Whether the compensation awarded by the Tribunal in MVC No. 1535/2003 dated 30.8.2006 is just and reasonable or it requires the enhanced?

iii) What order?

7. Brief back-ground of the case: The accident that occurred on 25.1.2003 at about 6.45 p.m. is not in dispute. The issuance of policy to the offending vehicle, so also, the death of rider of the scooty bearing No. KA-04-U-5060, who is the wife of first claimant and mother of second claimant, is not in dispute. Hence, these facts are not being delved upon in this appeal.

Reg: Point No. i)

8. Admittedly, insurer has deposited the compensation amount before the jurisdictional tribunal and has not questioned the judgment and award passed by the tribunal. In this back-ground, it has to be examined as to whether insurer would be entitled to question the judgment and award passed by the tribunal and seek for modification, that too, for reduction of the compensation awarded by the Tribunal. IT is no doubt true that the power of appellate Court under Order 41, Rule 33 CPC is exhaustive in order to do substantial justice to the parties. This Court in the case of The Oriental Insurance Co. Ltd. Vs. Akkayamma and Others, has relied upon the judgment of Hon''ble Apex Court in the case of Delhi Electric Supply Undertaking Vs. Basanti Devi and Another, , and held as under:

18. This provision was explained by this Court in Mahant Dhangir and Another Vs. Madan Mohan and Others, in the following words (at P.58 of AIR);

The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellant Court could pass any decree or order, which ought to have been passed in the circumstances of the case. The appellate Court could also pass such other decree or order as the case may require. The words ''as the case may required'' used in Rule 33 of Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. What then should be the constrain? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these: that the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of the judgment of the lower Court. If these two requirements are there, the appellate Court could considered any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities.

19. Conditions as laid in provision of Order 41, Rule 33 are satisfied in the present case. When circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the Court cannot be found wanting when it comes to exercise its powers

Admittedly, in the instant case, insurer has deposited the amount awarded by the Tribunal before the jurisdictional Tribunal on 9-11-2007 by Cheque Nos. 387611-02 for Rs. 12,17,137/- and Rs. 57,460/-. The balance amount of Rs. 47,137/- (which includes interest) has also been deposited before the jurisdictional Tribunal in the name of 2nd appellant at Karnataka Bank, City Civil Court Extension Counter, Bangalore, which, the 2nd claimant would be entitled to seek payment on his attaining majority.

9. This appeal came to be presented by the claimants on 13-4-2007, i.e., after receipt of the amount awarded by the Tribunal. The first respondent insurer having been served with the notice of this appeal by the Registry of this Court, has entered appearance on 22.8.2008 through present Advocate. Having accepted the judgment and award passed by the tribunal and inspite of there being service of notice on the insurer about the appeal in question, there is no cross objection or cross appeal by the insurer as contemplated under Order 41, Rule 22 CPC. In the absence of cross appeal or cross objection being filed and having accepted the judgment and award passed by the tribunal, by consciously depositing the amount before the jurisdictional tribunal, first respondent insurer would not be entitled to contend that the provisions of Order 41, Rule 33 CPC is to be applied. There is no material to demonstrate before this Court by the first respondent that the amounts deposited before the Tribunal were without prejudice to the right of the insurer. In the absence thereof, the insurer would not be entitled to challenge the judgment and award passed by the Tribunal by taking recourse to Order 41, Rule 33 CPC without filing appeal of cross-appeal/ objection under Order 41, Rule 22 CPC. Hence, Point (i) is answered in favour of the appellants and against the insurer.

10. Regarding Point (ii): Admittedly, the Tribunal, on the basis of salary certificate produced as also the original acquittance roll produced at Ex.P. 21 and 21(a) came to the conclusion that gross salary of the deceased was Rs. 10,720/- and the net salary at Rs. 9,354/-. The said finding is based on proper appreciation of evidence. At this juncture, it would be of relevance to extract the admission of PW-1 in his cross-examination wherein he has admitted to the following effect:

This would clearly go to show that there was no financial dependency of the claimants on the income of the deceased. in the said factual background, it cannot be held that the compensation awarded by the tribunal is not just and reasonable.

11. Though Mr. Mohan Kumar, learned Counsel appearing for first respondent relied upon the judgment of this Court in the case of A. Manavalagan Vs. A. Krishnamurthy and Others, to buttress his argument that claimants are entitled to only loss of estate of the deceased, I am unable to accept said plea for being adjudicated and to scale down the compensation in the instant case for the simple reason that there is no challenge to the award of the tribunal either by filing appeal or cross objection in the instant case and also in view of the fact that Point No. (i) has been answered against insurer. It also requires to be noticed that admittedly second claimant, who is the son of the deceased, was not only depending on the deceased but the first claimant also was dependant atleast to the extent of loss of estate, in view of there being no contrary evidence available on record to disbelieve the dependency of the claimants on the income of the deceased and first respondent also having not elicited any admission worth consideration in the cross examination of PW-1 on this aspect, this Court would not embark upon conducting roving enquiry to ascertain the loss of dependency in as much as there is no appeal or cross objection filed by the insurer as already observed hereinabove.

12. Thus, the one and only conclusion that can be drawn would be to affirm the judgment and award passed by the tribunal by holding that compensation awarded by the tribunal under the heads, as noted herein above, would be just and reasonable compensation which cannot be interfered with.

13. Regarding Point (iii):In view of the above discussion, following order is passed:

ORDER

Appeal is dismissed. Judgment and award dated 30-8-2006 passed in MVC No. 1535/2003 by the 1st Addl. Judge and MACT, Bangalore, is hereby confirmed. No order as to costs.

Registry to draw the award accordingly.

