

**(2010) 02 GUJ CK 0135**

**In the Gujarat High Court**

**Case No :** First Appeal No. 358 of 2010 and C.A. No. 1999 of 2010

ICICI Lombard General Insurance Co. Ltd.

APPELLANT

Vs

Subhashbhai Ramashish Kasva (Pal) and Others

RESPONDENT

**Date of Decision :** 24-02-2010

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33  
Motor Vehicles Act, 1988 — Section 163A

**Citation :** (2011) ACJ 1570 : (2010) 51 GLR 1601

**Hon'ble Judges :** H.K. Rathod, J

**Bench :** Single Bench

**Advocate :** Vibhuti Nanavati, for the Appellant; None, for the Respondent

## **Judgement**

H.K. Rathod, J.—Heard learned Advocate Mr. Vibhuti Nanavati for appellant ICICI Lombard General Insurance Co. Ltd.

2. By filing this appeal, appellant Insurance Company is challenging award made by M.A.C.T. Ahmedabad in M.A.C.P. No. 167 of 2007 Exh. 39 decided on 3-9-2009 wherein Claims Tribunal has awarded Rs. 4,09,000/- in favour of respondents claimants with 7.5 % interest. Brief facts of present appeal are as under:

On 7-10-2007, at about 5-30 p.m., deceased Yadram Rajput was driving loading rickshaw No. GJ. 1. AZ.7395 belonging to opponent No. 1 and as per say of his master, he was going from Odhav to Lunavada, but after passing Kathlal village, all of a sudden, said loading rickshaw turned turtle and in said accident, driver of said loading rickshaw had sustained serious fatal injuries. He was shifted to Government Hospital at Kathlal immediately and was admitted as indoor patient, and there, during course of his treatment, he succumbed to injuries. Therefore, based upon aforesaid facts, claim petition was filed by claimants-parents of deceased before Claims Tribunal inter alia contending that the deceased was serving as a driver and earning Rs. 3000-00 p.m. Before Claims Tribunal, on being served, opponent No. 1 has appeared and filed his written statement

denying all averments made by claimants in their claim petition and in last para of his written statement, it was contended by him before Claims Tribunal that in case of any responsibility to pay compensation, opponent No. 2 to which offending rickshaw is insured, will be liable. Opponent No. 2-Insurance Company filed its written statement at Exh. 12 denying the manner in which accident occurred and also denied age and income of deceased. It was contended by Insurance Company before Claims Tribunal that accident in question occurred due to negligence on the part of deceased. Lastly, it was contended that the claim made by claimants, even otherwise is highly excessive, exorbitant and speculative, and therefore, same is required to be dismissed with costs.

3. Then, issues have been framed by Claims Tribunal at Exh. 19 and issue No. 1 has been examined by Claims Tribunal after considering object and reasons of Section 163A of Motor Vehicles Act while coming to conclusion that there is no question of any negligence on the part of driver of loading rickshaw. Accordingly, issue No. 1 has been decided by Claims Tribunal. Before Claims Tribunal, one Subhash Ramashish Kushvah, owner of loading rickshaw has been examined at Exh. 37. He stated in his deposition that he has filed his written statement at Exh. 16. In his cross-examination, it was admitted by him that deceased Yadram was his employee and serving as a driver and deceased was getting Rs. 3000-00 per month as salary. Considering deposition of owner of loading rickshaw, quantum of compensation has been worked out by Claims Tribunal as per Section 163A, read with 2nd Schedule of M.V. Act. Age of deceased has been decided on the basis of post mortem report at Exh. 25. Income of Rs. 3000-00 per month has been admitted by owner of loading rickshaw, and thereafter, Claims Tribunal has considered certain decisions relied upon by both sides and 1/3rd amount has been deducted as per Second Schedule from income of Rs. 3000-00, and then, net amount comes to Rs. 2000-00 per month, annual figure comes to Rs. 24000-00 and looking to age of deceased 35 years, 16 multiplier has been applied and so, net figure towards dependency benefit has been worked out by Claims Tribunal at Exh. 3, Rs. 84,000-00 and then Rs. 20,000-00 has been awarded towards loss of expectancy of life and Rs. 5,000-00 for funeral benefits. So, in all, it comes to Rs. 4,09,000-00 with 7.5 percent interest awarded by Claims Tribunal.

4. In this appeal, no doubt, in appeal memo, appeal is preferred challenging amount of Rs. 2,84,500-00. In appeal memo, number of contentions have been raised by appellant before this Court, but it is necessary to note important facts that the Insurance policy which has been issued by appellant in respect of loading rickshaw where risk of driver is covered, meaning thereby, additional premium for covering risk of driver has been paid by owner of vehicle. Claim petition was filed u/s 163A of Motor Vehicles Act, and therefore, it is not necessary for claimant to establish negligence either of driver or owner or any other person, and therefore, that question has been rightly examined by Claims Tribunal while considering object and reasons of Section 163A of M.V. Act. Recently Apex Court has examined scope of Section 163A in terms of Second

Schedule in case of Reshma Kumari v. Madan Mohan reported in 2009 AIR SCW 6999 and another decision in case of National Insurance Co. Ltd. v. Gurumallamma reported in 2009 AIR SCW 7434. It is necessary to note that both decisions as referred to above are given by Apex Court on 23rd July, 2009 by same Division Bench of Apex Court (Coram : Hon"ble Mr. Justice S. B. Sinha and Hon"ble Mr. Justice Cyriac Joseph, JJ.). In light of ratio decided by Apex Court in two decisions as referred to above, learned Advocate Mr. Nanavati not raised any legal contentions in respect to scope of Section 163A read with Second Schedule of M.V. Act, but he raised one contention before this Court in respect of quantum which has been awarded by Claims Tribunal beyond scope of Second Schedule. He submitted that out of income of Rs. 3,000-00 determined by Claims Tribunal, if 1/3rd is deducted, remaining 2/3rd would come to Rs. 2,000-00, and annually it would come to Rs. 24,000-00 and applying multiplier of 16, loss of dependency benefit would come to Rs. 3,84,000-00. That has not been objected by learned Advocate Mr. Nanavati. Therefore, after considering dependency as above, Rs. 3,84,000-00. Conventional amount of Rs. 20,000-00 which has been awarded by Claims Tribunal for loss of expectation of life is, according to him, beyond scope of Section 163A and Second Schedule of M.V. Act. He also submitted that funeral amount of Rs. 2,000-00 and Rs. 2,500-00 for loss of estate is to be awarded and no other amount is to be awarded while deciding application as per Section 163A read with Second Schedule of M.V. Act. Therefore, as per his submission, award of Rs. 20,000-00 for conventional amount and Rs. 5,000-00 for funeral expenses, both are required to be modified by this Court in interest of justice while exercising appellate powers under Order 41, Rule 33 for doing complete justice in present matter. Therefore, according to him, out of Rs. 25,000-00, Rs. 4,500-00 is to be deducted on the head of general damages and remaining amount Rs. 20,500-00 which is found to be excessive, contrary to Second Schedule, that amount is to be reduced with proportionate costs and interest. He submitted that even this Court can reduce it without calling respondents claimants, because according to him, if this appeal is admitted by this Court calling claimants, then, claimants will be required to engage Advocate and it may happen that the claimants may have to incur legal expenses almost same amount, and therefore, he submitted that Court may consider it and reduce it accordingly and modify award in question for bringing it in consonance with Second Schedule of M.V. Act.

5. I have considered submissions made by learned Advocate Mr. Vibhhuti Nanavati. His submission is right/legal because in Second Schedule, there is no conventional amount mentioned which is to be awarded to claimants in case of death of a person in vehicular accident. Therefore, Rs. 20,000-00 itself is beyond the scope of Second Schedule. As per Second Schedule, Rs. 2,500-00 is to be awarded for loss of estate and Rs. 2,000-00 for funeral expenses total of which comes to Rs. 4,500-00. Therefore, out of that, Rs. 20,500-00 is to be reduced being an excessive amount awarded by Claims Tribunal contrary to provisions of Section 163A read with Second Schedule of M.V. Act. I have also considered fact

that while reducing such amount according to principles of natural justice. I have to admit matter and then I have to call claimants, and thereafter, after hearing claimants, this Court can reduce it. But, if this Court will issue notice to claimants, then, claimants will have to engage lawyer in present proceedings and lawyer would charge his legal fees as an Advocate of High Court, naturally, ultimately, it may result to some more loss to claimants, and therefore, I am not inclined to issue notice to respondents-claimants for modifying award in question reducing it by Rs. 20,500-00 with proportionate costs and interest as appellate Court is having powers under Order 41, Rule 33 for doing complete justice between the parties as decided by Division Bench of Karnataka High Court in case of Oriental Insurance Co. Ltd. v. Akkayamma 2009 ACJ 2635. Relevant observations made by Karnataka High Court in Paras 13, 14, 15 are quoted as under:

13. A learned Single Judge of this Court in the case of Smt. Kanthamma and Others Vs. Nanjunda Devaru and Others, has followed the principles laid down by the Apex Court in the aforesaid cases. A Division Bench of this Court in the case of Patel Chandrappa v. Hanumanthappa 1990 (3) KLJ 264 has granted reliefs to certain parties who have not come up in appeal against the judgment of the trial Court. The Division Bench in this reported decision has observed that having regard to the provisions contained in Rule 33 of Order 41 of Civil Procedure Code, it is the duty of the Court to grant a relief to them if in law they are entitled to a share in the suit schedule property.

14. Again the Hon''ble Supreme Court in Delhi Electric Supply Undertaking Vs. Basanti Devi and Another, has considered the powers of appellate Court under Order 41, Rule 33 of Civil Procedure Code. Relevant observations are found in Paras 18 and 19 which read thus:

18. This provision was explained by this Court in Mahant Dhangir and Another Vs. Madan Mohan and Others, in the following words (at page 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 appellate 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 require" 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 constraint? 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 consider 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. x x x

15. In view of the law laid down by the Hon"ble Supreme Court and this Court in the decisions referred to supra, if it is clear from the judgment of the Tribunal that the Tribunal has committed grave error while computing loss of dependency by applying improper method and when it is apparently noticed that the compensation awarded is grossly inadequate having regard to the legal evidence placed on record by the claimants, in order to do complete justice, this Court should exercise discretionary power under Order 41, Rule 33 of Civil Procedure Code. In the light of discussion made above, we are of the opinion that this is a fit case in which exercise of powers under Order 41, Rule 33 CPC is warranted, as the compensation awarded by the Claims Tribunal is grossly inadequate. As noticed above, Exh. P 8 is the salary certificate which shows that the deceased was earning a total salary of Rs. 9,913-00 p.m. The contents of Exh. P8 is not disputed. Exh. P8 is issued by a public undertaking, namely, B.E.L. Therefore, there is no difficulty in placing reliance on Exh. P 8 for reckoning monthly income of the deceased just prior to his death. It is well settled law that the salary drawn by the deceased as on the date of his death should be taken into consideration for assessing the loss of dependency and except statutory deductions for income tax and professional tax, no other deductions should be allowed from the gross salary. If gross salary of Rs. 9,913/- as shown in Exh. P8 is taken as monthly salary of the deceased, the annual salary works out to Rs. 1,18,956-00 As the deceased had more 12 years of service, it is reasonable to expect that his salary would not have been the same till the date of superannuation. Therefore, keeping in mind the hike in salary during the rest of the period of service and no additional weightage is given on this count while computing the gross income, no deduction towards income tax or professional tax is warranted. Therefore, annual gross deceased of the has to be taken at Rs. 1,18,956. If 1/3rd of this amount is deducted towards his personal expenses, the balance 2/3rd works out to Rs. 79,304. The appropriate multiplier applicable to the age of deceased is 12. Thus, total loss of dependency works out to Rs. 9,51,648. The Tribunal ought to have awarded this amount under the head of loss of dependency In addition to this, the claimants are entitled for compensation under conventional heads. The Tribunal has awarded Rs. 50,000-00 under conventional heads. We confirm the said award.

6. The Apex Court has, in Choudhary Sahu (Dead) by Lrs Vs. State of Bihar, observed as under:

8. The only other order on which the State of Bihar could rely upon is Order 41,

Rule 33 C.P.C. The High Court did not consider the provisions of Order 41, Rule 33 as in its opinion the order of the Commissioner could be supported on the strength of Order 41, Rule 22. In the view that we have taken regarding the applicability of Order 41, Rule 22 it becomes pertinent to consider the applicability of Order 41, Rule 33 of the Code of Civil Procedure. Insofar as material, it reads:

33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although, such respondents or parties may not have filed any appeal or objection.

Illustration : A claims a sum of money as due to him from X or Y, and in a suit against both, obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.

This rule is widely expressed and it must be applied with great caution. The object of this rule is to empower the appellate Court to do complete justice between the parties. Under this rule the Court has power to make a proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties, even though, they may not have filed an appeal or objection.

9. Reliance has been placed on *Nirmala Bala Ghose and Another Vs. Balai Chand Ghose and Others*, This Court dealing with the scope of Order 41, Rule 33, observed as follows : (at p. 1884 of AIR)

The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal, the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41, Rule 33 may properly be invoked. The rule, however, does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.

10. In the case cited above, there were two sets of defendants in the suit and in substance two decrees, though co-related, were passed. One of the decrees could stand apart from the other. One set of defendants were two deities. The suit was decreed against them. They did not go up in appeal nor did they take part in the proceedings either before the High Court or before the Supreme Court, although they were impleaded as respondents. The other set of defendants,

Nirmala, sought to invoke the powers of the Appellate Court under Order 41, Rule 33 to pass a decree in favour of a party not appealing so as to give the latter a benefit which she had not claimed. In such a situation, this Court observed:

When a party allows a decree of the Court of First Instance to become final, by not appealing against the decree, it would not be open to another party to the litigation, whose rights are otherwise not affected by the decree, to invoke the powers of the appellate Court under Order 41, Rule 33, to pass a decree in favour of the party not appealing so as to give the latter a benefit which he has not claimed. Order 41, Rule 33 is primarily intended to confer power upon the appellate Court to do justice by granting relief to a party who has not appealed, when refusing to do so, would result in making inconsistent, contradictory or unworkable orders.

11. Counsel for the State of Bihar, on the other "hand, referred to *Giani Ram and Ors. v. Ramiji Lal and Ors.* while construing the provisions of Order 41, Rule 33, this Court observed:

...the expression "which ought to have been passed" means "what ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed was in fact not passed by the subordinate Court, it may pass or make such further or other decree or order as the justice of the case may require.

12. The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to re-open decrees which have become final merely because the Appellate Court does not agree with the opinion of the Court appealed from.

13. Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this rule, the Court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the Law of the Limitation or the Law of Court Fees etc.

7. Therefore, considering aforesaid decisions in light of facts of present case, this Court can exercise powers under Order 41, Rule 33 of C.P. Code for doing complete justice between the parties for keeping award made by Claims Tribunal in consonance with Section 163A and 2nd Schedule of M.V. Act. Small amount is to be reduced from amount awarded by Claims Tribunal which is not legal right of claimants as per Second Schedule of M.V. Act, and therefore, award passed by Motor Accident Claims Tribunal, Ahmedabad in M.A.C.P. No. 167 of 2007 Exh. 39

is hereby reduced from Rs. 4,09,000-00 to Rs. 3,88,500-00 and an amount of Rs. 20,500-00 is reduced with proportionate costs and interest, and therefore, now, appellant Insurance Company is required to pay amount as per award modified by this Court, Rs. 3,88,500-00 (Rupees three lacs eighty eight thousand five hundred only) with 7.5 percent interest from date of claim petition till realization with proportionate costs within the period of one month from date of receiving copy of this order. After realizing said amount from appellant Insurance Company, Claims Tribunal is directed to disburse amount to respondents-claimants as per directions given in award. It is made clear that this award has been modified by this Court in absence of claimants, and therefore, if claimants are having any grievance, then, it will be open for claimants to file appropriate application before this Court. This appeal is, therefore, partly allowed. Today, this Court has allowed first appeal partly, therefore, no order is required to be passed on Civil Application for stay. Accordingly, Civil Application for stay stands disposed of accordingly.