

(2018) 09 SHI CK 0002

In the High Court Of Himachal Pradesh

Case No : First Appeal from Order (MVA) No. 317 of 2015

ICICI Lombard General Insurance Company Limited Vs Reena Devi And Others

Date of Decision : 04-09-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 41 Rule 33

Citation : (2018) AAC 1776 : (2018) 3 SimLC 1370

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Jagdish Thakur, Ashok Kumar Thakur, Anjana Khan, Avinash Jaryal

Final Decision : Allowed

Judgement

Sandeep Sharma, J.

CMP No. 7868 of 2018

1. By way of instant application, applicant-Leela Devi, who is mother of the deceased Sonu Kumar, has sought her impleadment as respondent No.5.

Learned counsel for the appellant states that he does not intend to file reply to the application and has no objection in case application is allowed and

applicant is arrayed as respondent No.5 in the present appeal. Learned counsel for the appellant invites attention of the Court to para-31 of the

impugned award, wherein aforesaid person has been held entitled to Rs.3,00,000/- being mother of deceased and a first class legal heir, however, it

seems that her name was not added in the memo of parties in the Award.

2. Accordingly, the application is allowed. Applicant-Leela Devi is arrayed as respondent No.5 in the present appeal. Registry to carry out necessary

corrections in the memo of parties. Application stands disposed of.

FAO No. 317 of 2015

3. By way of appeal at hand, appellant has challenged Award dated 17.1.2015 passed by Motor Accident Claims Tribunal(III) Shimla, H.P. in MAC

Petition No. 141-S/2 of 2012, whereby compensation to the tune of Rs. 15,12,000/- has been awarded in favour of the claimants-respondents No. 1 to

3 and one Smt. Leela Devi (now arrayed as respondent No.5) alongwith interest at the rate of 7.5% , from the date of petition till the date of realization.

4. Facts of the case, as emerge from the record are that one Sonu Kumar, aged 31 years, husband of respondent No.1 and father of respondents No.2

and 3, died in a motor vehicle accident on 22.10.2011 at Kholgali towards Chhaila Mor involving Pick-up bearing registration No. HP-63A-0683,

owned and being driven by respondent No. 4 Ajay Kumar, which was insured with the appellant-Insurance Company. It is alleged in the claim petition

filed by respondent No. 1 to 3 that after purchasing readymade garments at Shimla, deceased Sonu Kumar hired the above mentioned vehicle, which

was being driven by respondent No.4. Due to rash and negligent driving on the part of respondent No.4. Vehicle in question fell down the road

resulting into death of Sonu Kumar on the spot. It is alleged that deceased, who was 31 years of age at the time of accident, was earning Rs.20,000/-

per month and as such compensation to the tune of Rs.20,00,000/- was sought by respondents No. 1 to 3.

5. Respondent No.4, while resisting the claim petition, admitted the factum of hiring of the vehicle by Sonu Kumar, however, allegations of rash and negligent driving were denied by the aforesaid respondent.

6. Appellant-Insurance Company, while resisting the claim petition, took preliminary objections of maintainability, petition being bad for non-joinder of

parties and vehicle being plied in violation of the terms of the insurance policy, driver of the vehicle not having a valid and effective driving licence and

further that the driver was driving the vehicle under the influence of liquor. Age, occupation and income of deceased were denied. Amount claimed as

compensation was stated to be highly exaggerated.

7. Learned Tribunal below, on the basis of pleadings of the parties, framed following issues on 17.4.2013:

â??1) Whether the respondent No. 1 was driving his vehicle No. HP-63A-0683 in a rash and negligent manner and committed accident at Khol-galli

towards Chhaila, thereby causing death of Sonu

Kumar, as alleged? ... OPP.

2) If issue No. 1 is proved in the affirmative, to what amount of compensation the petitioners are entitled being wife, daughter and son and from

whom? OPP

3) Whether the petition is not maintainable, against the respondent in the present form, as alleged? OPR-1&2

4) Whether the petition is bad for non-joinder of necessary parties, as alleged? OPR-2.

5) Whether the respondent No.1 was plying the vehicle in question against the terms and conditions of the policy? If so its effect? .OPR-2.

6) Whether the respondent No.1 was not having valid and effective driving licence at the time of driving of the vehicle when it met with an accident,

as alleged, if so its effect? ... OPR-2.

7) Whether the respondent No.1 was driving the vehicle under the influence of liquor on the day of accident, as alleged, if so its effect? ... OPR-2.

8) Relief.â??

8. Learned Tribunal below, on the basis of evidence led on record by the respective parties, allowed the petition and awarded a sum of Rs. 15,12,000/-

alongwith interest at the rate of 7.5% per annum, i.e. Rs.13,87,200/- on account of loss of income/dependency after applying multiplier of 17,

Rs.1,00,000/-under the head of loss of consortium, Rs.25,000/- under the head of funeral expenses. The amount of compensation has been apportioned

amongst the claimants and respondent No.5 in the following manner i.e. Rs.5,12,000/- to respondent No.1, Rs.3,50,000/- each to respondents No.2 and

3 and Rs. 3,00,000/- to respondent No.5.

9. Being aggrieved and dissatisfied with the compensation awarded by the learned Tribunal below, appellant-Insurance Company has approached this

court in the instant proceedings, praying therein for setting aside the award.

10. I have heard the learned counsel for the parties and gone through the record carefully.

11. As per the claim put forth by respondents No.1 to 3, deceased Sonu was earning Rs.20,000/- per month, however, respondent No.1, while

appearing as PW-1 deposed that her husband was earning Rs.15,000/- per

month. It is an admitted fact that no evidence was led on record to prove income of the deceased. The learned Tribunal below has taken the income of the deceased at Rs.6,000/- per month. Though respondent No. 1 has not mentioned the age of the deceased in the claim petition but in the post-mortem report age of deceased has been shown as 33 years and as such, multiplier of 17 has been applied by the learned Tribunal below. While computing the loss of dependency, the learned Tribunal below has taken the income of deceased at Rs.9,000/- after granting an addition of 50% (Rs.6000+Rs.3000) and after deducting 1/4th amount towards self-expenses, the learned Tribunal below has calculated total loss of dependency at Rs.81,600/- per annum (Rs.6800 x 12).

12. In this regard, learned counsel representing the appellant-Insurance Company has drawn the attention of this court to the fact that in the year 2011, when accident in question took place, income of deceased could be taken at Rs.4600/- per month only since the rate of daily wages at the relevant time was Rs.151/-. Learned counsel for the appellant-Insurance Company further stated that the addition of 50% made by the learned Tribunal below to the income of the deceased is also not correct and same ought to have been 40%.

13. Having perused the law laid down by Hon'ble Apex Court in National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157, this court is persuaded to agree with the contention of learned counsel representing the appellant-Insurance Company that the Tribunal has erred in making addition of 50% of actual salary /income of deceased while determining future prospects. This Court is also in agreement with the contention of the learned counsel representing the appellant-Insurance Company that in the aforesaid judgment Hon'ble Apex Court has specifically quantified the amounts to be paid under conventional heads i.e. loss of estate, loss of consortium and funeral charges. Relevant paragraphs of aforesaid judgment are reproduced herein below:

47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional

method and granted Rs. 5,000/- for transportation of the body, Rs.

10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss

of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The

Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted

from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different

amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss

of consortium. We are inclined to think so, for what it states in that regard. We quote:-¹⁷. In legal parlance, consortium is the right of

the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head

of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get,

has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of

compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the

right of a spouse to get compensation even during the period of temporary disablement.

By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society,

assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions,

since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head.

Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium.¹⁸

49. Be it noted, Munna Lal Jain (2015 AIR SCW 3105) (supra) did not deal with the same as the notice was confined to the issue of application of

correct multiplier and deduction of the amount.

50. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule of the Act. The said

Schedule has been found to be defective as stated by the Court in Trilok Chandra (supra). Recently in Puttamma and others v. K.L. Narayana Reddy

and another it has been reiterated by stating:-

“we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario

including the present cost of living and current rate of inflation and increased life expectancy.”

51. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also

provides for General Damages in case of death. It is as follows:-

3.General Damages (in case of death):

The following General Damages shall be payable in addition to compensation outlined above:-

(i) Funeral expenses- Rs.2,000/-.

(ii) Loss of Consortium, if beneficiary is the spouse-Rs.5,000/-

(iii) Loss of Estate - Rs. 2,500/-

(iv) Medical Expenses “ actual expenses incurred before death supported by bills/vouchers but not exceeding “ Rs. 15,000/-”

52. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok

Chandra (supra) and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice,

in different cases different amounts have been granted. A sum of Rs. 1,00,000/- was granted towards consortium in Rajesh. The justification for grant

of consortium, as we find from Rajesh, is founded on the observation as we have reproduced hereinbefore.

53. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/-

towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/-

towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

55. Presently, we come to the issue of addition of future prospects to determine the multiplicand.

56. In Santosh Devi the Court has not accepted as a principle that a self-employed person remains on a fixed salary throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the poor. Emphasis has been laid on the extra efforts made by this category of persons to generate additional income. That apart, judicial notice has been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In Rajesh's case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just, equitable, fair and reasonable. This addition

has been made in respect of self employed or engaged on fixed wages.

57. Section 168 of the Act deals with the concept of 'just compensation' and the same has to be determined on the foundation of fairness,

reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be

perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual

case. The conception of 'just compensation' has to be viewed through the prism of fairness, reasonableness and non violation of the principle of

equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an

apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the

tribunal to be guided by the expression, that is, 'just compensation'. The determination has to be on the foundation of evidence brought on record

as regards the age and income of the deceased and thereafter the opposite multiplier to be applied. The formula relating to multiplier has been clearly

stated in *Sarla Verma* (supra) and it has been approved in *Reshma Kumari* (supra). The age and income, as stated earlier, have to be established by

adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to

reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity

of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an

adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its

ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization

keeping in view the principle of certainty, stability and consistency. We approve the principle of 'standardization' so that a specific and certain

multiplicand is determined for applying the multiplier on the basis of age.

58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. *Sarla Verma* (supra) has

carved out an exception permitting the claimants to bring materials on record to

get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of

the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of selfemployed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding

precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased

had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to

50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less

tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the

deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the

deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the

income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30

to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/-

and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years.â??

14. After weighing the rival contentions vis-À-vis law laid down in Pranay Sethi, this court finds that the income of the deceased has wrongly been

taken at Rs.6,000/- per month in the absence of any evidence having been led, except the bald statement of PW-1 and as such, same deserves to be

taken at Rs.4600/- per month. Similarly, an addition of 50% to the income of deceased has wrongly been made, which ought to have been 40%. As

such, this Court deems it fit to modify the amount awarded under this head as under:

Income of the deceased = Rs.4600/- (Rs.151(daily) x 30= Rs.4530 or Rs.4600

Addition of 40% = Rs.4600 x 40% = Rs.1840/-

Total income =Rs.6440/-

1/4th Deduction = Rs.6440/- x ¼ = Rs.1610/-

Net Income =Rs.4830/- per month (Rs.57,960/- per annum)

15. Now, so far as question of multiplier is concerned, though the learned counsel representing the appellant-Insurance Company has contended that

same ought to have been 16 as per Sarla Verma case, but this court deems it fit to uphold the multiplier applied by learned Tribunal below, which has

been applied as per Schedule II of the Act. Therefore, the total loss of dependency would come to Rs.57960x17= Rs.9,85,320/-.

16. So far grant of consortium to respondent No.1 on account of death of her husband is concerned, learned Tribunal below has awarded an amount

of Rs.1,00,000/- under the aforesaid head which is in view of the law laid down by the Hon'ble Apex Court in Pranay Sethi, ought to have been

Rs.40,000/- and as such, this Court deems it fit to modify the amount awarded under the head of loss of consortium to Rs.40,000/- and as such, award

under challenge is further modified to the extent of grant of loss of consortium.

17. Under the head of funeral charges also, this court is of the view that amount has been awarded on higher side, which deserves to be modified and

as such, same deserves to be modified to Rs.15,000/- instead of Rs.25,000/-.

18. Learned counsel for the respondents No.1 to 3 have raised another issue i.e. no amount has been granted under the head of loss of estate and as

such this Court also deems it fit to grant an amount of Rs.15,000/- under the head of 'loss of estate'. Otherwise also, the Hon'ble Apex

Court in Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639, has held that amount of compensation can be enhanced

by an appellate court, while exercising powers under Order 41 Rule 33 CPC. It would be profitable to reproduce following para of the judgment

herein:-

'Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further

or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate

court to enable it to do complete justice between the parties. Order 41 Rule 33

CPC can be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer.â??

19. Consequently, in view of aforesaid modification made herein above, respondents No.1 to 3 and 5 are held entitled to following amounts under various heads:

1. Loss of dependency Rs.9,85,320/-
2. Loss of consortium Rs.40,000/-
3. Loss of estate Rs.15,000/-
4. Funeral charges Rs.15,000/-
- Â Total Rs.10,55,320/-

20. The amount shall be apportioned amongst respondents No.1 to 3 and 5, as under:

1. Respondent No.1 =Rs.3,55,320/-
2. Respondents No.2 and 3 =Rs.2,50,000/- each
3. Respondent No.5 = Rs.2,00,000/-

21. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld.

22. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award dated 17.1.2015 passed by Motor Accident Claims Tribunal(III) Shimla, H.P. in MAC Petition No. 141-S/2 of 2012, is modified to the above extent only.