

(2016) 11 MAD CK 0003
In the Madras High Court
Case No : C.M.A. No.357 of 2014

Kuppan S/o Mariappan

APPELLANT

Vs

Managing Director Karnataka State Transport Corpn. Ltd.,
Bangalore Rural Division Archakarahalli, P.M.Road
Ramnagaram, Karnataka

RESPONDENT

Date of Decision : 16-11-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 168

Citation : (2017) AAC 1128 : (2017) 1 LW 113

Hon'ble Judges : Mr. T.Raja, J.

Bench : Single Bench

Advocate : Mr. Pa.Sudesh Kumar, Advocate, for the Appellants; Mr. T. Thiyagarajan, Advocate, for the Respondent No. 1; Mr. S. Manohar, Advocate, for the Respondent No. 2

Final Decision : Allowed

Judgement

Mr. T.Raja, J.—This civil miscellaneous appeal has been brought by the legal heirs of the deceased seeking enhancement of the award amount of Rs.18,05,496/- together with interest at the rate of 7.5% per annum granted in M.C.O.P. No.81 of 2011 by the Motor Accident Claims Tribunal, Subordinate Judge, Hosur, Krishnagiri.

2. Mr. Pa. Sudesh Kumar, learned counsel for the appellants submitted that when the breadwinner Mr. K.Saravanan (since deceased) was serving as Operator in M/s Thai Summit Neel Auto Private Limited, Haritha Industrial Complex, Hosur, to attend his duty, he was riding the Hero Honda motorcycle bearing Registration No. TN 70 A 1820 from Hosur to the said company along with his friend Mr. Ramdas as pillion-rider on 24.10.2010 at about 7.30 A.M. When they were proceeding on the Hosur to Thally main road, near Vikas Nagar bridge, the driver of the Karnataka State Road Transport Corporation bearing Registration No. KA 42 F 123, belonging to the first respondent and insured with the second

respondent, came with high speed in a rash and negligent manner and dashed against the motorcycle, thereby the rider of the motorcycle sustained severe injuries to head and other vital organs of the body and succumbed to the injuries on the spot. The pillion rider also sustained injuries on his face, head and other parts of the body, for which he laid a separate claim. Now the question raised in the present appeal, he pleaded, is that when the employment of the breadwinner was established as having served as Operator in M/s Thai Summit Neel Auto Private Limited, Haritha Industrial Complex, Hosur at the time of accident, earning a sum of Rs.9,930/- with the production of the pay slip marked as Ex.P5 and one Mr. M. Marimuthu, the Manager of the company examined as P.W.4, has also explained before the Tribunal that the deceased employee was earning a sum of Rs.9,930/- per month, in spite of the clear and acceptable evidence produced by the claimants with regard to the monthly salary, the Tribunal has wrongly deducted Rs.1,680/- representing the conveyance and washing allowances and finally fixed a sum of Rs.7,641/-. Thereafter, applying the ratio laid down by the Apex Court in Sarla Verma and others v. Delhi Transport Corporation and another, 2009 (2) TN MAC 1 (SC), it has added 50% of the actual salary towards future prospects and thereby arrived at annual income of the deceased at Rs.1,37,538/-. Out of the said amount, since the claimants were five in number, namely, parents, wife and two children, it has deducted one-fifth of the same towards the personal expenses of the deceased and fixed the annual income at Rs.1,10,031/- and after applying the multiplier "16", since the deceased was aged about 34 years, arrived at the loss of dependency at Rs.17,60,496/-. However, with regard to the compensation towards loss of consortium, a meagre amount of Rs.10,000/- has been given to the third appellant-wife, a sum of Rs.25,000/- has been awarded towards mental agony and Rs.10,000/- towards funeral expenses, thus totalling to Rs.18,05,496/-. With regard to the loss of love and affection, the Tribunal has completely lost sight of the legal position for payment of a just and reasonable compensation under this head. Therefore, it is a fit case for enhancement of the compensation, he pleaded.

3. Adding further, he submitted that this Court, being the first appellate Court, exercising its power under Order 41, Rule 33 of the Civil Procedure Code, ignoring the factor that the claimants have restricted their claim for enhancement in a sum of Rs.1,25,000/-, following the judgment of the Hon'ble Division Bench in C.M.A. No.306 of 2014 dated 1.10.2015 (Universal Eompo General Insurance Company Ltd., Mumbai v. Uma and others), can award a just and reasonable compensation to the claimants. He also submitted that when the Apex Court in the cases of Municipal Board, Mount Abu v. Hari Lal, 1988 ACJ 281, Dangir v. Madan Mohan, AIR 1988 SC 54, Managing Director, Pallavan Transport Corporation Ltd. v. Kalavathi, 1998 (1) ACJ 151 and in State of Punjab v. Bakshish Singh, (1998) 8 SCC 222 has reiterated the principle that under Order 41, Rule 33 of C.P.C., the first appellate Court can always enhance the compensation in appropriate cases, in the present case, after the accident, the widow and her two minor children have lost their sole earning member. In

addition thereto, the age old parents have also lost their only son, as a result all the people have been rendered orphans. Therefore, a just and reasonable amount of compensation may be awarded towards loss of consortium and loss of love and affection, in the light of the aforesaid judgment of the Division Bench, wherein a sum of Rs.1,00,000/- has been awarded towards loss of consortium and a sum of Rs.1,00,000/- each has been awarded towards loss of love and affection to the children and Rs.50,000/- each has been awarded to the parents, to meet the ends of justice. Again taking support from one another judgment of the Division Bench of this Court in C.M.A. Nos. 2196 and 2197 of 2015 dated 1.10.2015 (M/s New India Assurance Company Ltd., Bangalore v. Shakunthala and others), the learned counsel urged this Court to award some more reasonable compensation under the head "pain and sufferings" to the claimants.

4. Opposing the above prayer, Mr. S. Manohar, learned counsel for the second respondent insurance company, heavily urged this Court to allow the appeal as such, since the appellants have sought for enhancement of compensation of Rs.1,25,000/- in to without adding anything more than the prayer. With regard to the second contention made on the side of the appellants that in exercise of the power conferred under Order 41, Rule 33 of C.P.C., the appellate Court could grant some more compensation being just and reasonable, he pleaded that the appellants, having preferred the appeal for enhancement, cannot rely upon the said provision, since this Court has evolved a scheme to safeguard the interest of the respondents/litigants who had failed to prefer appeal, only in a fitting case. But in the present case, when the appellants themselves have come to this Court restricting their claim only to a sum of Rs.1,25,000/-, they cannot be allowed to rely upon the provision of Order 41, Rule 33 of C.P.C. Adding further, he submitted that when the Tribunal, rightly accepting the pay slip marked as Ex.P5 showing that the deceased was earning a sum of Rs.9,930/-, after deducting the amount of Rs.1,680/- towards conveyance and washing allowances, adding 50% of the actual salary towards future prospects, although made a deduction of one-fifth towards the personal expenses, instead of one-fourth, as per the ratio laid down by the Apex Court in Sarla Verma's case reported in 2009 (2) TN MAC 1 (SC), after adopting the right multiplier, has arrived at the just compensation, no more amount can be enhanced further. Again placing on record the judgment of the Apex Court in Puttamma and others v. K.L. Narayana Reddy and another, 2014 ACJ 526, he submitted that the Apex Court, after the judgment in Rajesh and others v. Rajbir Singh and others, (2013) 9 SCC 54, has fixed a sum of Rs.50,000/- towards loss of consortium. Therefore, when the Apex Court has not followed the judgment in Rajesh and others case, which clearly says that it is not a hard and fast rule to follow the ratio laid down by the Apex Court, he prayed for rejecting the contention made by the learned counsel for the appellants with regard to the award of Rs.1,00,000/- each to the children of the deceased towards loss of love and affection and also a sum of Rs.1,00,000/- to the widow towards loss of consortium.

5. Adopting the said argument, the learned counsel for the first respondent

Transport Corporation also submitted that when the appellants themselves have come to this Court seeking a specific prayer for enhancement of Rs.1,25,000/- alone, they cannot be once again allowed to take a somersault to ask for more amount of compensation, taking into account the subsequent judgments delivered by the Apex Court and also by this Court. He also submitted that as rightly indicated by the learned counsel for the second respondent insurance company, Order 41, Rule 33 of C.P.C., is exclusively meant for the respondents who failed to file appeal and the said provision cannot be invoked by the appellants. On this score, he also joined hands with the learned counsel for the insurance company to allow the appeal to the limited extent as prayed for by the appellants.

6. Having considered the arguments made by the learned counsel for the parties, so far as the fixation of compensation under the loss of dependency is concerned, the Tribunal, accepting the case of the claimants that Rs.9,930/- has been paid as the monthly salary, on the basis of evidence adduced by one Mr. M. Marimuthu, the Manager, who was examined as P.W.4, which was supported by the pay slip, Ex.P5 issued for the month of November, 2010, rightly deducting Rs.1,680/- towards the conveyance and washing allowances, has arrived at a sum of Rs.7,641/- per month as the actual salary of the deceased. Although the Tribunal has accepted the pay slip, Ex.P5 produced for the month of November, 2010 showing a monthly salary of Rs.9,930/- including the conveyance and washing allowances drawn by the deceased, it has wrongly arrived at a sum of Rs.7,641/-, instead of Rs.8,250/-, as the actual salary. Therefore this Court is inclined to take the actual salary at Rs.8,250/-. As per the ratio laid down by the Apex Court in Sarla Verma's case, 50% of the actual salary shall be added towards future prospects, which comes to Rs.4,125/-. Out of the total sum of Rs.12,375/-, since the claimants are five in number, namely, parents, wife and two minor children, as per the ratio of the Apex Court in Sarla Verma's case, one-fourth deduction shall be made towards the personal expenses of the deceased, instead of one-fifth deduction as was made by the Tribunal wrongly, which works out to Rs.9,281/-. Again, applying the multiplier "16", as the deceased falls in the age group of 31-35 years, this Court arrives at a sum of Rs.17,81,952/- ($\text{Rs.9281} \times 12 \times 16 = \text{Rs.17,81,952/-}$) towards loss of dependency, instead of Rs.17,60,496/- arrived at by the Tribunal.

7. The other controversy arising in the case on hand is whether this Court, in the appeal brought by the appellants, is entitled to exercise the power conferred under Order 41, Rule 33 of C.P.C., to award a just and reasonable compensation, because the objection raised by the respondents shows that the said power is conferred on the appellate Court only for the purpose of doing justice to the party who failed to file an appeal. In this context, it is relevant to refer to the provision of Order 41, Rule 33 of C.P.C., which reads as follows:-

"Order XLI-Appeals from Original Decrees Rule 33. Power of Court of Appeal.-- 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 [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

[Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]"

8. A mere reading of the above provision shows that 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. Therefore, this Court hardly finds any merit to accept the objection of the respondents. The reason is that when the power has been conferred to the Court of appeal under Order 41, Rule 33 of C.P.C., it cannot be restricted to the respondents in this case, on the ground that the appellants, who have come to this Court seeking one relief, should not be allowed to request the Court to exercise the power under the said provision in their favour. Moreover, the solemn purpose of conferring such power on the Court of appeal is only to render substantial justice. In the present case, although the appellants have restricted their prayer for enhancement of Rs.1,25,000/-, in the light of the ratio laid down by the Apex Court in *Dangir v. Madan Mohan*, AIR 1988 SC 54, *Managing Director, Pallavan Transport Corporation Ltd. v. Kalavathi*, 1998 (1) ACJ 151 and in *State of Punjab v. Bakshish Singh*, (1998) 8 SCC 222 cases relied on by the Hon"ble Division Bench in C.M.A.No.306 of 2014 dated 1.10.2015 (*Universal Eompo General Insurance Company Ltd., Mumbai v. Uma and others*), I am of the considered view that without filing cross objection to the respondents' appeal, the appellants could pray for relief and that the High Court under Order 41, Rule 33 of C.P.C., not only can apply the said provision to the respondents, but also to the appellants. The Division Bench, while considering the said provision, has come to the conclusion that the Court has got power to enhance the compensation even though the claimants have not filed any cross objection seeking for higher compensation, if this Court finds that the award of the Tribunal is not just and reasonable. The relevant paragraphs of the judgment of the Hon"ble Division Bench can be usefully reproduced below:-

"20. Having regard to the error committed by the Claims Tribunal in not awarding a just and reasonable compensation under the above heads, this Court, in exercise of the powers under Order 41, Rule 33 , is inclined to rectify the same

and suo motu enhance the compensation. Reference can be made to few decisions:

(i) Municipal Board, Mount Abu v. Hari Lal, 1988. ACJ 281.

(ii) Dangir v. Madan Mohan, AIR 1988 SC 54.

(iii) M.D.Pallavan Transport Corporation Ltd., v. Kalavathi, 1998 (1) ACJ 151.

(iv) State of Punjab v. Bakshish Singh, 1998.(8) SCC 222.

9. The perusal of the aforesaid Judgments of the Hon"ble Apex Court would clearly highlight that without filing cross Appeal, the respondents in the Appeal could pray for reliefs and that the High Court under Order 41, Rule 33 could grant such reliefs also. This Court in several cases adhering to the aforesaid decisions of the Hon"ble Apex Court held that under Order 41, Rule 33 of C.P.C., this Court could enhance the compensation in appropriate cases. An excerpt from the decision of this Court in Managing Director, Thanthai Periyar Transport Corp., Villupuram v. Sundari Ammal and four Others reported in 1999 (2) CTC 560 would run thus:

"Unfortunately, in the instant case, there is no cross-objection. Therefore, it would be essential, in this context, to consider whether this Court has got powers to enhance the amount of compensation, in the event of coming to the conclusion that the award was on the lower side, even though there is no cross-objection by the claimants.

In Dangir v. Madan Mohan , AIR 1988 S.C. 54 and M.D., Pallavan Transport Corporation Ltd., v. Kalavathi , 1998 (1) A.C.J 151, it is held that this Court has got power to enhance the compensation, even though the claimants had not filed any cross-objection against the award seeking for higher compensation, if this Court finds that the amount awarded by the Tribunal is not just and adequate.

As pointed out by the Apex Court in State of Punjab v. Bakshish Singh , 1998 (8) S.C.C. 222, the reading of the provision would make it clear that the Appellate Court has got wide power to do complete justice between the parties and which enables this Court to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the party in whose favour the power is sought to be exercised has not filed any Appeal or cross-objection.

The Apex Court in Dhangir v. Madan Mohan, A.I.R. 1988 S.C. 54, be referring Order 41, Rule 33 , would make the following observation:

The Appellate Court could exercise the power under Rule 33 even if the Appeal is only against a part of the decree of the lower Court. The Appellate Court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any Appeal or objection. 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 corespondents. The

Appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The words 'as the case may require' used in Rule 33, 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 giving any liberal interpretation. The rule itself is liberal enough. the only constraints 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 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 is true that the power of the Appellate Court under Section 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."

10. And then the Division Bench of this Court in the decision in *The Managing Director, Annai Sathya Transport Corporation Ltd., Dharmapuri v. Janardhanam and 7 others* , 2000 (2) CTC 272 placing reliance on the decision of the Hon'ble Apex Court held a similar view that without cross Appeal Order 41, Rule 33 of C.P.C. could be invoked in appropriate cases. An excerpt from it would run thus:

"At this stage, learned counsel appearing for the respondent/claimants would submit that the Tribunal has awarded interest only from the date of the Judgment and not from the date of the petition. The learned counsel for the respondents/claimants would submit that even though no Appeal has been filed by the respondents/claimants or no cross-objections have been filed by them, this Court has discretionary power by virtue of Order 41, Rule 33 of Code of Civil Procedure and also in view of the rulings of the Supreme Court in *Dhangir v. Madan Mohan* , AIR 1988 SC 54 to grant the proper relief. Of course, the Apex Court has pointed out in clear and categorical terms and the power conferred under Order 41, Rule 33 on the Appellate Court is discretionary, and then it must be used in proper case using the judicial discretion to render justice. The Apex Court in *United India Insurance Co., Ltd., v. Narendra Pandu-rang Kadam and others* , 1995 (1) SCC 320 has clearly laid down that the rate of interest must be awarded from the date of the petition and not from the date of the Judgment."

9. Again the Hon'ble Division Bench, referring to a judgment of another Division Bench in C.M.A.(MD) No.714 of 2009 dated 5.8.2009 (*Tamil Nadu State Transport Corporation v. Pothumponnu*), emphasising the importance of enhancement of compensation in a deserving case to meet the ends of justice, while dismissing the appeal filed by either the insurance company or the Transport Corporation, has held that in the absence of the claimants, without even issuing notice, a just and reasonable compensation can be enhanced even in the appeal filed by the insurance company. The relevant portion of the judgment is reproduced below:-

"17. Notice can be issued to the opposite parties/respondents only in case where

their rights are going to be affected by way of variation/reduction. In this case, the claimants are going to be benefited. Hence, no notice is necessary in the appeal. When the Tribunal commits a mistake that too a material mistake, this Court cannot close its eyes and decide the matter mechanically. When the mistake is noticed by this Court, this Court has got power to do away with it, even while dismissing the appeal at the admission stage itself. The presence of the respondent is not a must. When there is a case for admission, the matter can be admitted and notice can be ordered. When there is no case made out for admission, the appeal deserved to be dismissed. While dismissing, the material irregularity committed by the Tribunal can be set right by awarding suitable amounts to the respondents without notice to them. The presence of the claimants or absence does not make any difference. Even if they are present and they do not bring it to the notice of this Court about the irregularity, this Court can always remedy the same suo motu under Order 41, Rule 33 of the Code of Civil Procedure and Section 173 of the Motor Vehicles Act and invoking Article 227 of the Constitution of India. Moreover, Sections 163 and 166 are beneficial provisions of the Motor Vehicles Act aimed at consoling and compensating the victims of the accident. This Court's approach should be humane in nature not whittled down by technicalities. The powers of the Court are wide enough to do complete justice."

10. In the light of the settled legal position, when the learned counsel for the appellants has produced before this Court the judgment of the Division Bench in C.M.A.No.306 of 2014 dated 1.10.2015 (Universal Eompo General Insurance Co.Ltd., Mumbai v. Uma and others) granting Rs.1,00,000/- each under the head of loss of consortium to the wife and Rs.1,00,000/- each to the children of the deceased family, this Court has no hesitation to invoke the power conferred on the Court of appeal under Order 41, Rule 33 of C.P.C., in favour of the appellants. Accordingly, this Court, following the ratio laid down by the Apex Court in Rajesh and others v. Rajbir Singh and others, (2013) 9 SCC 54 making it clear that a minimum of at least Rs.1,00,000/- should be awarded towards loss of consortium and a like sum to each of the children of the deceased, is inclined to award a sum of Rs.1,00,000/- towards loss of consortium to the third appellant-wife, Rs.1,00,000/- each to the fourth and fifth appellants-children and Rs.50,000/- each to the first and second appellants-parents towards loss of love and affection. Further a sum of Rs.25,000/- is also awarded towards funeral expenses.

11. In the result, the appellants/claimants are entitled to a total compensation of Rs.22,06,952/- together with interest at the rate of 7.5% per annum from the date of petition till the date of realisation payable by the second respondent insurance company. Out of the said amount, the first and second appellants are entitled to Rs.3,00,000/- each, the third appellant is entitled to Rs.6,06,952/- and the fourth and fifth appellants are each entitled to Rs.5,00,000/-.

12. Since it was represented that the entire amount of compensation had already been deposited, the second respondent is directed to deposit the balance amount

of compensation representing the enhancement to the credit of the M.C.O.P. No.81 of 2011 on the file of the Motor Accident Claims Tribunal, Subordinate Judge, Hosur, Krishnagiri District along with interest within a period of four weeks from the date of receipt of a copy of this order. On such deposit being made, the appellants 1 to 3 are entitled to withdraw the entire amount representing their share along with accrued interest by moving appropriate applications before the Tribunal, after complying with the formalities. However, the share of the minors shall be kept in deposit in a Nationalised Bank till they attain majority and the third appellant-mother is entitled to withdraw the interest accrued periodically. The civil miscellaneous appeal is allowed to the extent indicated above. No costs.