

(2005) 04 UK CK 0029
In the Uttarakhand High Court

New India Assurance Company Ltd.

APPELLANT

Vs

Dhana Devi and Others

RESPONDENT

Date of Decision : 11-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22

Citation : (2006) 2 ACC 275 : (2005) 3 UC 1913 : (2005) 2 UD 84

Hon'ble Judges : Rajesh Tandon, J;J.C.S. Rawat, J

Bench : Division Bench

Judgement

Rajesh Tandon, J.—Heard Mr. T.A. Khan, learned Counsel for the appellant and Mr. R.P. Nautiyal, learned Counsel for the respondents.

2. This is an appeal filed by the appellant the New India Assurance Company h challenging the award dated 24.7.2004 by which the Motor Accident Claims Tribunal awarded a sum of Rs. 3,74,400 along with interest @ 5% per annum.

3. Brief facts giving rise to the present appeal are that on 24.8.2000, the claimant with her husband Sri Sujan Singh was coming to Karnprayag from Simli for some private work on foot. All of a sudden at about 6.30 p.m. near Rakhri Gadhera a truck bearing No. U.P. 05-0174, which was being driven rashly and negligently met with accident and over-turned and due to the strike by the truck, the deceased fell down into the river and ultimately died.

4. The deceased was working in the department of Horticulture and was getting a salary of Rs. 4,330. The compensation has been claimed to the extent of Rs. 10,00,000 (Rupees ten lacs) by the claimant.

5. The defendant No.1 Insurance Company has filed a written statement, where the factum of accident was denied. However, it was admitted that the vehicle in question was insured from 18th October, 1999 to 17th October, 2000. Therefore, it is evident that at the time of the aforesaid i.e., on 24.8.2000, the vehicle was insured with the aforesaid Insurance Company. The Insurance Company although has taken various pleas that the terms of the policy were violated by the driver

and as such he is not responsible to pay the amount of compensation.

6. Respondent No. 2 the owner of the vehicle has filed a written statement, where he has stated that exorbitant amount has been claimed by the claimant. The Tribunal has framed four issues.

7. Issue Nos. 1,2 and 3 related to the factum of the accident having occurred from Truck No. U.P. 05-0174 and further vehicle was insured and the driver had a valid driving licence.

8. Issue No. 4 relates to the amount of compensation.

9. So far as the Issue Nos. 1, 2 and 3 are concerned, the Tribunal has recorded a finding that on 24.8.2000 the Vehicle No. 05-0174 was being driven rashly and negligently. The G.D. report, which has been filed as Paper No. 11-Ga has fully proved that due to the over-turning of the truck the deceased fell down into the Pinder river and ultimately died.

10. Sri Rajnish Kumar Mittal, DW2 was the Investigating Officer, who has investigated the offence and it has come in the evidence on the record that during the police investigation, it was brought to the notice that the deceased and Chintamani both have expired.

11. The Tribunal has also recorded a finding that at the time of accident, the driver had a valid driving licence and terms and policy of the insurance have not been violated.

12. So far as the compensation is concerned, it has come on the record that the deceased was getting a salary of Rs. 4,330. He was spending a sum of Rs. 1,930 on himself and, therefore, Rs. 2,400 was taken into consideration as salary. At the time of the accident the deceased was aged about 40 years.

13. We have considered the evidence on the record and have come to the conclusion as per findings of the Tribunal that the accident had occurred on account of the rash and negligent driving of the Truck. The said fact has been established from the Investigation Report Paper No. 11-Ga as well as from the statement of Sri Rajnish Kumar Mittal DW2 that the accident had occurred due to rash and negligent driving of the driver.

14. Learned Counsel for the appellant Mr. T.A. Khan has argued that it was a case of vis-majeure and there was no fault of the driver. A perusal of the evidence on the record shows that due to the rash and negligent driving, the vehicle in question has over-turned and it was not an Act of God. We are satisfied from the Investigation Report of the police that the driver was driving the vehicle rashly and negligently.

15. The other argument raised by the learned Counsel for the appellant that the deceased was gratuitous passenger. This argument of the learned Counsel for the appellant cannot be sustained as from the evidence on record, it is proved that the deceased was a pedestrian and the Truck in question has over turned and

thereafter, the pedestrian was made a tool of it and due to the vehicle in question, he died and went into the river, therefore, it was not a case where, the appellant was a gratuitous passenger so as to deprive the claimant from claiming any lawful compensation.

16. The law declared by the Apex Court i.e., *res ipsa loquitur* fully applies to the facts of the case that the accident had occurred due to rash and negligent driving of the driver, who was driving the vehicle in such a manner that the said vehicle has over-turned and the pedestrian was made a tool of the vehicle and by the same accident, he went into the river and then he died.

17. The deceased was employed in Horticulture Department, District Chamoli. He was getting a sum of Rs. 4,330 as monthly salary. The claimants have filed a salary certificate issued by District Horticulture Officer, Chamoli. The Tribunal has deducted a sum of Rs. 1,930 for own expenses of the deceased, if he would have been alive and thus the monthly dependency of the claimants was assessed to be Rs. 2,400 or Rs. 28,800 per annum. At the time of the accident the age of the deceased was 40 years. The Claims Tribunal applied the multiplier of 13 and thus assessed the compensation for Rs. 3,74,000 along with pendants lite and future interest @ Rs. 5% per annum.

18. In view of the law laid down by the Apex Court in *Post-Graduate Institute of Medical Education and Research and Another Vs. A.P. Wasan and Others*, , although no appeal has been preferred, but in view of the provisions of Order 41 Rule 22 of Code of Civil Procedure, the Appellate Court can modify the award. The law laid down by the Apex Court as under:

According to the appellants although they did not prefer a counter-appeal, which they could have done under the explanation to Order 41 Rule 22 of the Code of Civil Procedure, they could nevertheless challenge the finding in respondent's appeal to the Division Bench. It may be, as has been held in *Shri Ravinder Kumar Sharma Vs. The State of Assam and Others*, : that the Explanation, inserted by the 1976 Amendment to Order 41 Rule 22, the Code does not make it obligatory to file a cross-objection against an adverse finding of a lower Court and that the respondent could attack such finding in its submissions to the Appellate Forum. But in this case, there is nothing to show from the records that the appellants did in fact challenge the finding of the Single Judge before the Division Bench expressly recorded that the appellants had not challenged the finding. (See *Chitra Kumari v. Union of India* SCC at p. 220).

19. Further in the case of *Banarsi and Others Vs. Ram Phal*, , the Apex Court has illustrated the power of Court of Appeal under Order 41 Rule 33, C.P.C. and provided three limitations for exercising the power. The relevant paragraph of the judgment is quoted below:

Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The above said provisions confer power of the widest amplitude

on the Appellate Court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject-matter of the appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the Appellate Court may still direct passing of such decree or making of such order which ought to have been passed or made by the Court below in accordance with the findings of fact and law arrived at by the Court below and which it would have done had it been conscious of the error committed by it and noticed by the Appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the Appellate Court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the Appellate Court. The object sought to be achieved by conferment of such power on the Appellate Court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the Appellate Court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree if which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the Appellate Court exercising power under Rule 33 of Order 41.

20. We, therefore, modify the award to the extent that besides the amount awarded to the claimants by the Tribunal they are also entitled to Rs. 5,000 for loss of consortium and Rs. 2,000 for funeral expenses. Thus a total compensation of Rs. 3,81,000 is awarded to the claimants.

21. We, therefore, modify the award accordingly and the claimants are awarded a sum of Rs. 3,81,000 as compensation along with pendants lite and future interest @ 5% per annum.

22. Accordingly, the appeal is dismissed.